SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

No. 70-61

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PROJECT ON CORPORATE RESPONSIBILITY, *Amicus Curiae*

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
QUESTION PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The Commission's Decision Was on the Merits	7
a. Dow's reasons were adopted by reference	7
b. The Commission could not have intended to encourage a violation of its Rule	8
c. Rule 14a-9(b) is inapplicable	10
II. The Commission's Decision Was Sufficiently Definitive and had Such Consequences as to Constitute it a Reviewable Order	11
a. Nothing preliminary or interlocutory was involved	11
b. There were substantial consequences to the Commission's future administration, to Dow and to the Committee	12
III. Review Does Not Invade the Commission's Discretion	14
a. Review here serves only to correct errors of law or abuse of discretion which result in denial of relief to those within the zone of interests protected by the Exchange Act	14
b. If Dow's proposed omission of the Committee's proposal would be unlawful, the Commission had no discretion to declare it to be lawful	15
IV. Calling the Commission's Decision a "No Action" Ruling Confuses Analysis and is not a Valid Reason for Denying Judicial Review	16
a. The instant determination differed in context, purpose and effect from the Commission's typical ex parte advisory ruling	16
b. The ruling differed significantly from other rulings in the proxy area	18

Page

c. Rule 14a-8 is not a mere disclosure requirement 19

d. Ex parte resolution of 14a-8 controversies is neither customary nor warranted 21

V. The Possibility of Relief Against Dow in a District Court Does Not Bar Review of the Commission's Order in a Court of Appeals 22

a. An appropriate Court of Appeals is the specified forum for judicial review 22

b. The Committee's need was to modify or set aside the Commission's ruling rather than to obtain an injunction against Dow 22

c. Court of Appeals review is not a futile remedy 24

VI. The Decision Below Does Not Threaten a Flood of Appellate Litigation 25

a. The decision applies only to security holder proposals, and most security holders are likely to accept adverse Commission rulings 25

b. Review at the instance of a regulated company is not a necessary consequence of the decision below and, if available, the possibility of resort to it is remote . . . 26

VII. Experience With the Administration of Rule 14a-8 Demonstrates the Need for Court Review 28

a. There is need for articulated Commission opinions reconciling its interpretation of the Rule, particularly the limitations involved in this case, with the Congressional purpose to provide fair corporate suffrage 28

b. The Court of Appeals' discussion of the merits further illustrates the need for review 29

VIII. The Decision Does Not Impose an Unreasonable Burden of Formalization in the Area to Which it Applies 32

IX. Review Under Section 25 Extends to Delegated Decisions Which Are Denied Review by the Commission 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 . . . . . 13, 15, 27

Association of Data Processors v. Comp., 397 U.S. 150, 157 . . . 15

Brooks v. Standard Oil Co., 308 F. Supp. 810 (S.D. N.Y.) 24

City of Chicago v. United States, 396 U.S. 162 . . . . . 13, 14

Columbia Broadcasting System v. United States, 316 U.S. 407, 418 13

Curtin v. American Telgraph and Telephone Co., 124 F.Supp. 197 23

Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 27

Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 12

Frozen Foods Express v. United States, 351 U.S. 40 13

J. I. Case Co. v. Borak, 377 U.S. 426 (1964) 22

McGrath v. Kristensen, 340 U.S. 162 16

Mills v. Electric Auto-Lite Co., 396 U.S. 375 23

Office Employees International v. N.L.R.B., 353 U.S. 313 16

Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1001 14

Pa. R.R. v. United States, 363 U.S. 202 13

Peck v. Greyhound Corp., 97 F.Supp. 679 (S.D. N.Y.) 23

Perkins v. Elg, 307 U.S. 325 16

Red Lion Broadcasting v. F.C.C., 395 U.S. 367 27

Rochester, 307 U.S. 125, at 136. . . . . 14, 16

Schilling v. Rogers, 363 U.S. 366 15

S.E.C. v. Transamerica Corp., 163 F.2d 511 (C.A. 3, 19, 7) cert. denied, 332 U.S. 847 13

Udall v. Tallman, 380 U.S. 1, 16 12

United States v. Los Angelos R.R. Co., 273 U.S. 299 12

Page

Statutes, Rules and Regulations:

Administrative Procedure Act

Section 10(b) 22
Section 10(e) 9

Delaware Code, Title & Section 141a (Supp. 1968) 29

Securities Act of 1933 17

Securities Exchange Act of 1934

Section 14, 15 U.S.C. 78n . . . . . passim

Section 25(a), 15 U.S.C. 78y(a) 22, 25

Section 26, 15 U.S.C. 78z 10

Rules under the Securities Exchange Act of 1934

Rule 14a-4(b), 17 C.F.R. 240.14a-4(b) 20

Rule 14a-6(e), 17 C.F.R. 240.14a-6(e) 19

Rule 14a-8, 17 C.F.R. Section 240.14a-8 . . . . . passim

Rule 14a-9(b), 17 C.F.R. 240.14a-9(b) 10

Rule XXVI of the Securities & Exchange Commission Rules of Practice 34

Securities Exchange Act Releases:

Release No. 3638 28

Release No. 4979, 19 Fed. Reg. 246 3

Miscellaneous:

Clusserath, The Amended Stockholder Proposal Rule: A Decade Later, 40 N.D. Lawyer 13 (1964) 29

Davis Admin. Law, 1970 Supplement, Sec. 4, 10, p. 205 18

Disclosure to Investors 17

Discussion by Former Chairman Cohen and Others 20 Admin. Law Review 29 18

84 Harv. L. R. 835, 855-857 . . . . . 24, 29, 34

Hearing Before a Subcommittee of the Senate Banking & Currency Committe, 85th Cong. 1st Sess. Pt. 1 (1957) p. 118 10

	Page
Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Committee on Interstate and Foreign Commerce, 78 Cong. 1st Sess., Pt. 2 at 174-74 (1943)	20
Letter of Division Director Woodside, C.C.H. Fed. Sec. L. Rep. (52056 Transfer Binder) ¶90,659	9
Lockhart, Wm. J., Study of No Action Letters and Advisory Processes Administered by the Division of Corporation Finances of the Securities & Exchange Commission	17
6 Loss Securities Reg. 4023-4026	18
Schwartz, Public Interest Proxy Contests, 69 Michigan L.R. 421, 434	passim
Smith, Richard, 23 Admin. Law Review, 133 (March 1971)	17
57 Va. L. Rev. 331, 340 (1971)	34

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BRIEF FOR PROJECT ON CORPORATE RESPONSIBILITY, *Amicus Curiae*

INTEREST OF AMICUS CURIAE

The Project on Corporate Responsibility (Project) is a non-profit corporation, incorporated under the laws of the District of Columbia. The purpose of the Project is to study and make recommendations for ways in which corporations can be more responsive to the public interest. As part of this purpose the Project has submitted, and intends

to submit, shareholder proposals to corporations subject to the proxy rules promulgated by the Securities and Exchange Commission. As a shareholder, the Project has availed itself, and intends to avail itself of Commission Rule 14a-8, 17 CFR Section 240. The Project is accordingly interested in the disposition of this case, because of its probable impact upon the availability and practicality of judicial review of rulings of the Commission implementing that rule. With the consent of the parties it submits this brief, amicus curiae, in support of the decision of the court below.

QUESTION PRESENTED

Whether the action of the Commission complained of by respondent in the court below is an "order" directly reviewable by a court of appeals under section 25(a) of the Securities and Exchange Act, so that the court below properly undertook to consider the merits of the Commission's action, and, in the light of such consideration, to remand the case to the Commission for further proceedings consistent with that court's opinion.[1]

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[1]In the court below the Commission argued that the respondent Committee was not a party to a proceeding and not aggrieved. These contentions appear to be but alternative phrasings of the question posed in the petition and do not appear to us to require separate discussion. If the challenged Commission action is an "order" obviously, the procedure leading to it was a "proceeding" under section 25(a) and the Committee's direct interest and participation in it constituted the Committee a party. The adverse impact on the Committee is likewise in issue and is discussed herein as a major reason for regarding the Commission's decision as in substance an "order" for purposes of review.

STATEMENT

In view of the full statement in the brief for respondent we merely outline the principal steps in the proceedings before the Commission and in the court below. Respondent ("the Committee") undertook, pursuant to Commission Rule 14a-8, to require the management of Dow Chemical Company ("Dow") to include in its proxy material a proposal for vote of fellow stockholders on whether Dow's Certificate of Incorporation should be amended to ban manufacture of napalm. Dow, having decided to omit the proposal, was required, not later than 20 days prior to the date prescribed for filing its preliminary proxy material, to submit to the Commission the proposal, its reasons for omission and a supporting opinion of counsel. Dow did so, and as the rule also required, furnished a copy to the Committee. The announced purpose of this procedure is "So that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate." See Securities Exchange Act Release No. 4979 at p. 2; 19 Fed. Reg. 246 (January 14, 1954), quoted in the brief for the Commission at p. 19. The court below concluded with respect to this procedure:

> Thus, the Commission's procedural regulations governing proxy proposals incorporate the basic theory of an adversary encounter and a detailed perusal of Rule 14a-8 and its history reinforces this impression. (App. 60)

By letters dated February 18, 1969, the Commission's Division of Corporation Finance advised the parties that "for reasons stated in your [Dow's] letter and the accompanying opinion of counsel" the staff would "not recommend any action to the Commission" in respect of the contemplated omission. The Committee submitted written response and requested and obtained review of this staff determination by the Commission. The Committee also

requested, but was denied, oral argument before the Commission.

There are two versions of the Commission's action reviewed by the court below:

(a) Its official minute dated March 24, 1970 reads in pertinent part:

> "Upon the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1970, the Commission determined to raise no objection to the omission . . . ." (App. 44)

(b) The text of this minute was not immediately communicated to the parties. They were informed by letters from the Division that the "Commission has approved the recommendation of the Division . . . that no objection be raised if the company omits the proposal . . . ." (App. 42-43).[2]

In dealing with the merits of the Commission's action under review, the court below assumed, in accordance with a past announced interpretation by the Commission, that Dow had the burden of advancing valid reasons for omission of the proposal (App. 61-62, 71-76) citing 19 Fed. Reg. 246 (1954). See also, testimony of then Chairman Armstrong before Subcommittee of Senate Banking and Currency Committee, 85 Cong. 1st Sess., pt. 1 at p. 118 (1957). The court also noted that no issues of fact were raised before the Commission (App. 64).

There was no challenge in the court below to the Committee's contention that the Commission's determination was erroneous. Dow did not participate in the review proceeding. Counsel for the Commission advised the court below (at p. 2 of its brief in that court) ". . . The Commission expressed no view concerning the legal issues. . . . Con-

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[2] The official minute was not made available until after specific request of the Committee. (Statement to court below in brief, dated January 5, 1970, of counsel for Committee at p. 14, n. 2)

sequently, Commission counsel have not been authorized to express on behalf of the Commission any view concerning the application or interpretation of Rule 14a-8 with respect to the Medical Committee's controversy" with Dow.

Since the Commission's decision purported to rest upon recommendations of the Division of Corporation Finance which, in turn, rested upon the reasons advanced by Dow, the court below examined those reasons. The court found them insufficient, because in part inconsistent and in part, at least prima facie, contrary to law. (App. 70-79) Instead of setting aside the Commission's order, the court below stated because of "puzzlement as to how the Commission reached the result which it did" it was "forced to remand the controversy for a more illuminating consideration and decision." (App. 71)

The court did not indicate that a failure of the Commission to articulate reasons for its decision, would be in itself a reason for remand. Rather the basis for remand in this case was the probability of legal error by the Commission, as suggested by the insufficiency of the material presented by management and relied on by the Commission to meet management's burden of justifying the omission of a stockholder proposal, and the fact that Commission counsel had been unable, or unauthorized, to explain the rationale of the Commission's decision.

SUMMARY OF ARGUMENT

The determination of the Commission, upon undisputed facts, and written arguments of Dow and the Committee was a decision on the merits (a) because the Commission expressly based its conclusion on the recommendations of the staff which in turn were "for reasons stated" by Dow. (b) because the Commission must be presumed not to have intended the resulting encouragement of Dow to omit the Committee's proposal unless satisfied that Dow had met the burden of showing that the omission would not violate Rule 14a-8.

The decision was definitive in that it was the final agency action in the matter. The ruling of the Commission, fixed the course of future Commission administration with reference to the controversy, made it possible for Dow to proceed with confidence in a course of action claimed by the Committee to deny it a right conferred by the Rule and created an obstacle to the Committee obtaining judicial enforcement of that right.

These substantial legal consequences give the determination the basic characteristics of a reviewable order. Its negative form, if properly so described, does not prevent review. Expressing the Commission's determination in terms of a determination to "raise no objection" rather than "no violation" in no way lessens the impact upon Dow or the Committee, or the pressure upon the Commission *to refrain from* challenging Dow's omission. Calling the Commission's decision a "no action" ruling confuses analysis and is not a valid reason for denying judicial review.

Holding the Commission's action reviewable does not invade the area of its discretion (a) because only errors of law are involved and (b) because, whatever the Commission's discretion to do nothing about an indicated violation, it has no discretion to declare that proposed action which will involve a violation of law will not be so considered by the Commission.

Review in a court of appeals was the appropriate remedy for the Committee to contest the Commission's determination (a) because it is the "special statutory review proceeding relevant to the subject matter"; (b) because proceeding in a district court against Dow would have been an awkward and a more burdensome method for the Committee to challenge the Commission's ruling; (c) because the Committee did not seek and probably will not need remedies such as an injunction which only a district court can provide; and (d) because the Committee's basic need was to overcome the effect of an adverse ruling by the Commission.

To uphold court of appeals review of Commission rulings in disputes over security holders proposals, does not impose unreasonable administrative burdens in such cases, and is necessary to correct failure on the Commission's part to administer the rule in a manner consistent with the Congressional purpose. Upholding such review has no application to the great bulk of the Commission's informal advisory rulings in response to ex parte inquiries.

Amicus curiae agrees with the position in the brief for the Commission that the basic reasons given by the court of appeals for upholding judicial review of decision of the Commission under rule 14a-8 apply with equal force to a decision of the staff pursuant to delegated authority, provided that the person affected seeks review of the delegated decision and the Commission declines such review.

ARGUMENT

I. THE COMMISSION'S DECISION WAS ON THE MERITS

(a) Dow's Reasons Were Adopted by Reference

The Commission's brief (p. 23-24) suggests that the Commission's decision "to raise no objection" might have been because "it could not firmly conclude . . . that the rules required Dow to include the Committee's proposal, or . . . whatever might be the merits of the case, the issue did not warrant initiating an enforcement suit." The record negates this supposition. The Commission did make clear it had concluded that there was no violation, although this appears indirectly, by reference to other statements and there was no independent statement of Commission reasoning. Its official minute states that its decision was "upon the recommendation of the Division of Corporation Finance. . . ." This recommendation, in turn, as communicated to the parties in letters dated February 18, 1969, was not to "recommend any action for reasons stated in your [Dow's]

letter and the accompanying opinion of counsel." (App. 20a, 21a)[3]

(b) The Commission Could Not Have Intended To Encourage a Violation of its Rule

The context also makes it clear that the Commission's Ruling was on the merits. Disregarding for the moment any internal division between initial staff responsibility and Commission supervision or review, the whole purpose of the Rule 14a-8 procedure is to permit an agency determination whether management has met the burden imposed upon it of justifying an omission of a security holder's proposal. This was susceptible of determination in this case on the written submission's of both parties, there being no issue of fact.

The grounds for omission advanced by Dow involved application to the undisputed facts of standards formulated by the Commission. It was the agency's responsibility to apply these standards to the undisputed facts in a manner consistent with the purpose of Section 14 of the Exchange Act to provide "fair corporate suffrage." See the discussion of the merits in the opinion below (App. 71).

Under the circumstances it was the Commission's responsibility to decide the question presented. We believe the Commission did so decide, and we do not regard its ruling

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[3]The Commission's minute refers to two Division memoranda dated March 18, 1969. These memoranda were not made available to the Committee nor included in the transcript as certified by the Commission to the Court below, but there is no intimation that they were in any way inconsistent with the staff views as previously communicated to Dow and to the Committee. Indeed the petition for a writ of certiorari relies on that earlier expression of staff views as communicated to the parties and describes the "staff's conclusion" as "that under the rules the company was not required to include the proposal" although arguing "that the Commission expressed no opinion" on that conclusion. (p. 11)

as a mere Delphic utterance.[4] Accordingly, we do not urge that this is a case of "agency action unlawfully withheld or unreasonably delayed" within section 10(e) of the Administrative Procedure Act (App. 58) or "merely another manifestation of the venerable bureaucratic technique of exclusion by attrition, of disposing of controversies through calculated non-decisions that will eventually cause eager supplicants to give up in frustration and stop 'bothering' the agency." (App. 67).[5]

Even without other clue to the Commission's reasoning than the statement of its determination "to raise no objection to the omission," the necessary inference is that the Commission did not consider the omission unlawful. Otherwise the Commission would have been in the position of actually encouraging what it deemed to be a violation of law. We submit that there is no warrant for attributing to the Commission such an irresponsible attitude toward its statutory obligations.

We recognize of course that an agency with manifold responsibilities and limited resources may sometimes be justified in taking no enforcement action after learning that an apparent violation of law may have occurred, but this is

[4]Compare the letter of Division Director, later Commissioner, Woodside, cited at p. 21 n. 19 of the Brief for the Commission, C.C.H. Fed. Sec. L. Rep. (52-56 Transfer Binder) ¶ 90, 659. With reference to consideration by both staff and Commission of a dispute under Rule 14a-8 similar to that which occurred in the instant case, the Woodside letter treats a statement of non objection as equivalent to a conclusion that no violation would be involved. Thus the letter states that the Commission "ultimately reached the conclusion it would not object if the company determined to exclude the proposal" and at a later point referring to that determination, states that "the Commission upon full consideration of all views expressed, concluded that the omission would not violate the requirements of the rule, and determined it would not . . . take enforcement action."

[5]These observations in the opinion below may have been directed at arguments similar to those in the Commission's brief in this Court, and would be warranted only if those arguments are accepted.

quite a different matter from giving advance assurance of "no objection" to proposed conduct which the agency considers to be a violation.[6]

(c) Rule 14a-9(b) Is Inapplicable

The brief for the Commission (p. 24) refers to Rule 14a-9(b), as a disclaimer of "definitive determination of whether particular proxy materials comply with the rules when it advises the company as to its views on compliance." If this statement is intended to apply to a ruling in a security holder proposal dispute, as distinguished from a comment on whether proxy disclosures cover the required subject matter and are not misleading, we believe the text of Rule 14a-9(b) does not support the statement.

Rule 14a-9(b) does not deal with proposals that never get into proxy soliciting material but applies in terms only to "soliciting material" which "has been filed with or examined by the Commission." The Rule disclaims a finding of the Commission "that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement therein or any matter to be acted upon by security holders."

Rule 14a-9(b), like Section 26 of the Act, recognizes that cursory and ex parte examination, which is all that is administratively feasible with respect to proposed solicitation material (or reports and financial statements in the case of Section 26), cannot be more than a rough screening process.

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[6]The suggestion in the brief for the Commission (p. 23) that "without a detailed study of the case it could not firmly conclude that the rules required Dow to include the Committee's proposal" involves an improper shift of the burden of persuasion from Dow to the Committee, and is contrary to former Chairman Armstrong's testimony, that "Doubts are resolved in favor of the stockholders." *See* SEC Enforcement Problems: Hearings before a subcommittee of the Senate Banking and Currency Committee 85th Cong. 1st Sess. Part I (1957) p. 118.

Therefore it should not be relied on by the public as a determination by the staff or the Commission "that such material is accurate or complete or not false or misleading." Similarly the public needs to be cautioned that the Commission does not pass on the merits of either management or security holder proposals included in proxy statements. Thus, if Dow had accepted the Committee's proposal and supporting statement for inclusion in its proxy material, whether on its own volition or at the insistence of the Commission, the Commission's examination of the proxy statement, which would then include such material, would involve no "finding" that the proposal had merit, or that the Committee's supporting statement was accurate or not misleading. There is no need, however, to warn the public about proposals or statements they will never see, because omitted from a proxy statement. Moreover, the rule does not purport to disclaim responsibility for specific Commission expressions of opinion. Such disclaimers would serve no useful purpose. For example, if upon examination the Commission should conclude that proxy material is misleading, or fails in other respects to measure up to the requirements of the rule and so advises the filer, there would be no reason for watering down that conclusion by disclaimer of a "finding."

II. THE COMMISSION'S DETERMINATION HAD SUCH CONSEQUENCES AS TO CONSTITUTE IT A REVIEWABLE ORDER.

(a) Nothing Preliminary or Interlocutory Was Involved.

The brief for the Commission concedes (p. 29) that absence of a formal evidentiary hearing does not preclude review where the facts are not in dispute. The Commission's decision was "definitive" in the sense that it was the Commission's last word. As the court below noted "Here the administrative process had run its course . . . and there can be no basis for any fear that review of the decision would cause the courts 'to interfere in matters yet within the con-

sideration of the Commission.'" (App. 56). The Commission's determination thus did not have the preliminary or interlocutory character of the orders involved in *Federal Power Commission v. Metropolitan Edison Company*, 304 U.S. 375, and *United States v. Los Angeles R.R. Co.*, 273 U.S. 299, relied on in the brief for the Commission at pages 29-31.

(b) There Were Substantial Consequences to the Commission's Future Administration, to Dow and to the Committee.

The Commission's ruling unless and until modified by the Commission, or judicially determined to be erroneous, governs the future conduct of the Commission with referral to the Committee's proposal, had significant impact upon Dow's conduct, and stands as an obstacle to the Committee's obtaining judicial enforcement of rights claimed under Rule 14a-8. As a result of the advice received by Dow from the Commission, Dow was assured, and did not need explicit statement, that if it did omit the Committee's proposal there was no appreciable risk that the Commission would refer the matter to the Department of Justice for criminal prosecution, or that the Commission would bring a civil enforcement proceeding. There was similar practical assurance that if the Medical Committee should bring suit in any district court the Commission would not support the Committee either by intervention or as amicus curiae. The brief for the Commission states that there would be no estoppel if the Commission should change its mind and sue for injunction (p. 30). The cases cited scarcely support that conclusion in the event of an immediate reversal of position where no new facts are involved. In any event, the suggestion ignores the enormous moral pressure on the Commission to adhere to a position taken with the expectation of, and followed by, reliance thereon. Dow would moreover be in a position to urge the Commission's interpretation upon the District Court as having at least persuasive force. *See Udall*

v. Tallman, 380 U.S. 1, 16. The petition concedes that whether or not a court would be "legally obliged to do so, courts do give weight to the Commission's views." Petition p. 12, 13 n. 10. Thus, substantial legal consequences flowed from the Commission's determination. Cf. *Pa. R.R. v. United States*, 363 U.S. 202.

The Commission determination necessarily influenced the decision of Dow to omit the Committee's proposal. The possibility, stressed by the brief for the Commission, of a company disregarding a Commission determination that omission of a proposal would be in violation of the rule, in the hope that there could be no enforcement proceedings or in the hope that an enforcement court would disagree with the Commission, does not make that determination lack persuasive force. As this Court noted in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 418, "It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant consequences which failure to conform entails." The application of this observation to Rule 14a-8 determinations is indicated by the fact that apparently, there is but one instance where management has failed to comply with a Commission advisory ruling that a particular proposal must be included in its proxy material. Moreover, management resistance to the Commission in that case proved unsuccessful. *SEC v. Transamerica Corporation*, 163 F.2d 511 (C.A. 3, 1947) cert. denied, 332 U.S. 847. As noted in a recent law review article dealing with the operation of Rule 14a-8, "The Commission's decisions, in whatever form they appear are generally obeyed by the parties." See Schwartz—Public Interest Proxy Contests, 69 Michigan L.R. 421, 434. The Commission's decision thus had impact equivalent to other administrative determinations that have been held reviewable orders. *Columbia Broadcasting System v. U.S.*; *supra*; *Abbott Laboratories v. Gardner*, 387 U.S. 136; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; *City of Chicago v. United States*, 396 U.S. 162; *Frozen Foods Express v. United States*, 351 U.S. 40.

III. REVIEW DOES NOT INVADE THE COMMISSION'S DISCRETION.

(a) Review Here Serves only to Correct Errors of Law or Abuse of Discretion Which Result in Denial of Relief to Those Within the Zone of Interests Protected by the Exchange Act.

The brief for the Commission concedes, in view of *Rochester Telephone Corp. v. United States*, 307 U.S. 125, that "In the present case the fact that the Commission's determination was negative in form does not bar review." (at p. 31) This concession, however, appears to us a hollow one, in that it ignores a basic premise of the cases repudiating the negative order doctrine: that the function of judicial review is to correct agency errors of omission as well as errors of commission, too little regulation as well as too much. See *City of Chicago v. United States*, 396 U.S. 162. Review by members of the public within the zone of interests protected serves to "vindicate the public interest." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1001. Without such review, there is no counterbalance to persistent industry pressure to keep regulation to a minimum.

The brief for the Commission, while giving lip service to the doctrine that negative orders are reviewable, would substitute the concept of unreviewable agency discretion as a pervasive bar to review of virtually all denials of relief. Thus, the brief assumes that the issue presented to the Commission by the Committee was merely whether or not the Commission was required to take court enforcement action against Dow after an alleged violation had occurred. Starting with the premise, that the Commission has an unreviewable discretion to decide whether or not to take such enforcement action, the brief claims that even errors of law in an interpretive ruling, when no violation had occurred but which could have a bearing on the possibility of future enforcement action, are beyond the reach of court review. (Brief pp. 35-41)

The brief relies on cases like *Schilling v. Rogers*, 363 U.S. 366 where the policy of a particular statute such as the Trading with the Enemy Act was deemed to preclude any intervention by the Courts. There is no indication, however, that Congress intended Commission interpretation of its rules under the Exchange Act to be out of the reach of judicial review. On the contrary, as the court below noted, . . . the normal "strong presumption in favor of the court's power to review applies" (App. 55, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140). See also *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 157.

(b) If Dow's Omission of the Committee's Proposal Would Be Unlawful, the Commission Had No Discretion To Declare It Lawful.

For purpose of determining reviewability, at least, it must be assumed that on the undisputed facts, omission of the committee's proposal would violate Rule 14a-8 and therefore would be "unlawful" within Section 14(a) of the Exchange Act. The outer limits of the Commission's discretion with respect to an indicated violation of the Exchange Act, is to do nothing by way of enforcement action when apprised of an indicated violation. The Commission has no discretion to put its official blessing upon even a past violation by declaring it to be lawful, far less to encourage a violation by advance assurance of a determination "to raise no objection." Such affirmative action on the Commission's part presents the classic occasion for judicial review. Moreover, the brief for the Commission does not deny that the public interest standards of 14(a) of the Exchange Act, as implemented by Rule 14a-8, afford adequate standards for judicial review of its application of the Rule.[7]

[7]Indeed the brief for the Commission argues (pp. 42-43, n. 41) that a district court, at least, is competent to apply those standards even without guidance from the Commission.

It is in this context that the opinion below (at p. 69) quotes *Rochester*.

> "If the Commission was found to have proceeded on erroneous legal principles the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles." 307 U.S. 125, at 136.

See also *McGrath v. Kristensen*, 340 U.S. 162, *Perkins v. Elg*, 307 U.S. 325, *Office Employees Union v. N.L.R.B.*, 353 U.S. 313.

IV. CALLING THE COMMISSION'S DECISION A "NO ACTION" RULING ONLY CONFUSES ANALYSIS AND IS NOT A VALID REASON FOR DENYING JUDICIAL REVIEW.

(a) The Instant Determination Differed in Context, Purpose and Effect from the Commission's Typical Ex Parte Advisory Ruling.

One significant distinction between Rule 14a-8 determinations and the Commission's typical advisory procedures relates to the propriety of characterizing the decision as a mere "No action" ruling. See brief for the Commission, p. 43. While the Commission's expression of "no objection" in this case, did forecast that the Commission would take no enforcement action if the Committee omitted the proposal, far more was involved. As we have previously urged, there was explicit or at least implicit determination of no violation with significant consequences to the parties.[8]

Reference to the context in which the Commission's typical "no action" rulings occur, will further illustrate the distinction. The typical Commission (or staff) informal advisory ruling is issued, ex parte and confidentially, at the request of a person considering a course of action which he

[8] See pp. 7-11 *supra*.

considers to present a question of legality under a statute administered by the Commission. Typically, the question is whether a person who has acquired an unregistered security may sell it without complying with the registration requirements of the Securities Act of 1933. See Disclosure to Investors, March 1969, a report of an internal study group under then Commissioner Wheat, Chapter VI (p. 152, 156, 175); and William J. Lockhart's report on a Study of No Action Letters and Advisory Processes Administered by the Division of Corporation Finance of the Securities and Exchange Commission (prepared for a committee of the Administrative Conference of the United States), Page 6.[9] Lockhart notes that "substantially all of the letters issued by the Division are no action rather than interpretive letters" (p. 24), that "no action advice is usually given hypothetically in the sense that the staff does not purport to determine questions of evidentiary fact" although the staff insists upon full statement and does check its files for inconsistency, and sometimes requires some substantiation. (pp. 26-27)

This is the type of informal rulings, in the thousands, discussed in the brief for the Commission (p. 47 n. 45). We do not dispute their usefulness, their good repute, or the justification for using language of minimum commitment in disposing of such ex parte inquiries. The typical expression is that, on the basis of the facts presented, the staff will recommend, or the Commission will take, "no action." See article by then Commissioner Richard Smith, 23, Administration Law Review, 133 (March 1971). Conversely, an unfavorable informal ruling may be merely a refusal to issue a "no action" letter. The justification for limited commitment derives from the vast volume of the requests for advice, the need for summary disposition, the confidential

[9]Neither of these studies is concerned with the question of judicial review, but rather with the possibility of adopting formal rules or more frequent published interpretations, to reduce the need for informal ad hoc "no action" rulings. They are cited here only for their descriptive value.

character of the inquiry and the hypothetical and ex parte character of the rulings. The Commission may not properly foreclose the rights of parties not before it. Again, in the area of possible violation of the registration provisions of the Securities Act, the potential civil liability is drastic, and it is appropriate to warn the inquirer of that risk.[10]

(b) The Instant Ruling Differed Significantly from Other Rulings in the Proxy Area

Commission review of proxy statements, outside the area of Rule 14a-8 presents somewhat similar considerations, except that in most cases no clearly formulated question is presented. Rather, there has been filed with the Commission preliminary copy of a document which will be mailed in the form presented, unless the person filing the document is apprised of staff or Commission criticism or objection and decides to conform rather than risk enforcement action by the Commission. In the absence of a specific criticism the filer may be merely told: the staff has no comment. Sometimes a specific issue emerges and the advice may take the form of "no objection" to a particular solution. The preliminary filing is confidential and thus cannot become the subject of dispute with the filer's adversary until after

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[10] A further purpose of the language of minimum commitment may be to avoid premature precedential effect. Whether this purpose is actually achieved, whether the informal opinions should be more frequently couched in affirmative language, and whether the Commission should, or should not, make public more frequently the gist of Commission or staff "no action" rulings, are problems which have been of great concern to the financial ba but are, we believe, remote from the issues in this case. See Discussion by former Chairman Cohen and others. 20 Administrative Law Review 29; 6 Loss Securities Regulation 4023-4026; Davis Administrative Law, 1970 Supplement, § 4.10, p. 205.

mailing. See Rule 14a-6(e).[11] It would not be feasible to provide an opportunity for advance criticism by the potential distributees.[12] In the exceptional case of a contested corporate election, the adversary, of course, is known. Nevertheless, it probably would be impractical to provide adversarial procedures to resolve disputes as to the alleged misleading character of the contestants' successive documents of solicitation. Ex parte procedures are justified by time pressures, by the fact that the contesting parties have an opportunity through their own solicitations to answer the statements of their adversaries and by the further fact that the same ex parte procedures apply both to management and to opposition. "No action" type of rulings are a necessary consequence.

(c) Rule 14a-8 Is Not a Mere Disclosure Requirement

The brief for the Commission argues (p. 19) that a Rule 14a-8 determination by the Commission or its staff is indistinguishable from other determinations in the proxy area in that the Commission's sole purpose in conducting such review has been to ensure full disclosure to public investors." This statement ignores a significant and broader purpose of the rule—to provide "fair corporate suffrage." This as former Chairman Purcell put it, requires something more than an opportunity to "address the assembled proxies" at a

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[11] After mailing, as noted in the brief for the Commission (p. 27) the Commission may be confronted with claims of either contestant that the other contestant's mailed material is false and misleading or otherwise in violation.

[12] Indeed, a distributee who could offer intelligent criticism probably will not be misled and therefore has no need for correction. Moreover, to the extent that the preliminary copy may need correction to avoid misleading impact it would be undesirable that it have such publicity as could result from a public filing.

stockholder meeting. Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce. 78 Cong. 1st Sess., pt. 2 at 174-74 (1943). Providing the security holder some meaningful access to the corporate electorate involves different problems and different techniques from merely making sure that management does not use its monopolistic control of channels of communication in a misleading way.

It is true that, prior to the Rule, the Commission interpreted the goal of full disclosure as requiring management to reveal an anticipated security holder proposal if it was soliciting blanket authority to vote on any matter that might come before the meeting. The rule added to the prior requirement of disclosing the anticipated proposal the further requirement that the management proxy material include a proponent's 100 word statement, and also set up procedure for determining whether a proposal is a proper subject for stockholder's action. The rule also curtails what had previously been considered full disclosure, to the extent that it permits omission of a proposal which would be appropriate for stockholder action as a matter of state law. Thus, related Rule 14a-4(b) relieves management of the previously recognized obligation to disclose the proposal when soliciting blanket authority to vote it down.[13]

Whether or not as a matter of semantics it is appropriate to characterize Rule 14a-8 as a mere disclosure rule, the vital distinction between determinations with respect to the justification for omitting security holder proposals, and other aspects of Commission administration in the proxy area, is the special procedure under Rule 14a-8 to resolve

[13]Rule 14a-4(c) provides that "a proxy may confer discretionary authority to vote with respect to . . . .

(4) Any proposal omitted from the proxy statement and form of proxy pursuant to Rule 14a-8. . . ."

See Schwartz—The Public Interest Proxy Contest: 69 Mich L. Rev. 419, 436 n. 76.

the narrow issue of such justification after consideration of the views of both security holder and management.

(d) Ex Parte Resolution of Rule 14a-8 Controversies Is Neither Customary nor Warranted

As a further argument for considering Rule 14a-8 determinations to be indistinguisable from other determinations in the proxy area, the brief for the Commission makes the shocking suggestion that Rule 14a-8 determinations can be made ex parte and without consideration of the security holders response to management's justification for an omission. Thus the brief states (at page 32) "A security holder has neither the right to be heard before the Commission with respect to the proxy material, nor the duty to inform the agency concerning his views thereon."[14] The fact is that the rule requires such notice to the security holder as will enable him to respond to management's attempt to justify omission of a proposal; the practice is to permit submission of opposing views; basic considerations of fair procedure require no less; and failure of the security holder to avail himself of such opportunity as is open to him will obviously prejudice the security holder's case in any subsequent judicial inquiry.

[14] It is not clear from the context whether "the Commission" here is used to refer to the agency heads, in contradistinction from the staff acting under delegated authority, or as referring to the aggregate of the agency. Unless reference is to the aggregate we fail to see the relevance of the observation.

V. THE POSSIBILITY OF RELIEF AGAINST DOW IN A DISTRICT COURT DOES NOT BAR REVIEW OF THE COMMISSION'S ORDER BY A COURT OF APPEALS.

(a) An Appropriate Court of Appeals Is the Specified Forum for Judicial Review.

Section 25(a) by its terms is broadly applicable to review of any "order issued by the Commission in a proceeding under this chapter." Such private enforcement remedies as are available in a district court are not specified in the Act, but are derived from Section 27 which grants the district courts jurisdiction to enforce "violations" of the Act or of rules thereunder and of suits "to enforce any duty or liability created by this title." This Court has held that the consequence is to impose on the district courts a duty "to provide such remedies as are necessary to make effective the Congressional purpose." *J. I. Case Company v. Borak*, 377 U.S. 426. *Borak*, however, in no way suggests that the implied district court remedy curtails the review jurisdiction expressly conferred on the Courts of Appeals under Section 25(a). Preference for the express remedy is confirmed by Section 10(b) of the Administrative Procedure Act which provides that the "form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or in the absence of inadequacy thereof, any applicable form of legal action. . . ."

(b) The Committee's Need Was to Modify or Set Aside the Commission's Ruling Rather Than to Obtain an Injunction Against Dow.

The Commission's argument that only a district court remedy can fulfill the aggrieved security holder's needs, is predicated upon experience in proxy contests and suits to set aside corporate mergers because of allegedly misleading proxy statements. In such cases, the stakes are high, there is need for the general equity powers of a district court to

enjoin a meeting, or if it has already occurred, to shape relief in fairness both to the plaintiff and to the entire class of security holders. For example, there may be a question of setting aside a transaction brought about by a misleading proxy statement. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 cited in the brief for the Commission at pp. 9, 32, 33, 34 and 42.[15]

A security holder who believes his proposal has been improperly omitted has a different problem. An attempt to enjoin the distribution of management's proxy statement, or the holding of the meeting unless management includes the proposal, faces formidable obstacles, in part because of the short interval between Commission ruling and the final mailing by management and the closely following date of scheduled annual meeting. Time pressures on the district court, the potential prejudice to the company of requiring postponement of a meeting if the ultimate determination supports its omission, and the impracticality of requiring a bond from the security holder to cover damages from delay, all add to the normal reasons for judicial deference to administrative expertise in the interpretation of the Commission's own rule. Such considerations were emphasized as reasons for denying injunctive relief in *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D. N.Y.) and *Curtin v. American Telegraph and Telephone Company*, 124 F. Supp. 197 (affirmed per curiam, unreported C.A. 2, April 4, 1954). So far as we are aware, security holders have been uniformly unsuccessful in obtaining injunctions in such disputes.

Rather than attempt to obtain injunctive relief in the face of an adverse Commission ruling, the Medical Committee

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[15] In such cases the failure of the Commission to seek relief is less of an obstacle to the security holder's obtaining relief than in Rule 14a-8 controversies, because the limited and ex parte prior screening of the proxy statement by the Commission may carry little implication that an administrative judgment has focussed upon the specific respect in which the plaintiff may be complaining that the proxy statement was misleading.

sought only, by Court of Appeals review, to negate the impact of the Commission's ruling upon any similar proposals of the Committee applicable to future Dow stockholder meetings.[16]

(c) Court of Appeals Review Is Not a Futile Remedy.

The Commission argues that Court of Appeals relief if available should be considered only a prelude to further litigation. (Br. p. 44). But once the security holder obtains a favorable Commission ruling, as a result of court review, the possibility of management resistance becomes remote. Whether or not the court's decision would conclusively bind management, it would substantially butress the persuasive force of the Commission's ruling in conformity to the mandate; and we have seen that Commission rulings alone are normally sufficient to induce management compliance. See p. 13 *supra*.

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[16] While the petition for review was filed after the alleged violation and indeed after the meeting of the particular year, its purpose was to reach the prospective impact of the Commission's ruling upon future proposals. This prospective impact is recognized in the discussion of the question of possible mootness in the reply brief for the Commission dated February 1971, pp. 4-6.

In Brooks v. Standard Oil Co., 308 F. Supp. 810 (S.D.N.Y.) a security holder whose proposal had been rejected by management, apparently waited until after the meeting to sue the company in a district court for a declaratory judgment applicable to the submission of a similar proposal in connection with a future meeting. The appropriateness of the declaratory judgment procedure was not challenged, but the company prevailed on the merits. Assuming that security holders may use the declaratory judgment procedure in a district court to test the propriety of omission of their proposals, such suits involve basically judicial review of the Commission's determination that omission is consistent with Rule 14a-8, except that the attack is collateral and in a proceeding in which the Commission is not a party. The security holder if successful may still face the prospect of an appeal. It is hard to see an overwhelming advantage of this procedure over the statutory review provided in section 25 of the Exchange Act. See Note 84 Harv. L. R. 835, 855-857, discussing the relative merits of district court suits and statutory review under Section 25 as methods of judicial review.

Since the Committee regarded the Commission's ruling as the major obstacle to realization of the right conferred on it by Rule 14a-8, it sought only the relief from that ruling specified in section 25, namely Court of Appeals review "to modify or set aside in whole or in part" the action of the Commission. Under the circumstances that was a clearly appropriate, if not an exclusive remedy.

VI. THE DECISION BELOW DOES NOT THREATEN A FLOOD OF APPELLATE LITIGATION.

(a) The Decision Applies only to Security Holder Proposal Controversies, and Most Security Holders Are Likely to Accept Adverse Commission Rulings.

The brief for the Commission concedes (pp. 46-47) that the decision applies directly only to security holder proposal disputes. Such disputes have not been numerous although the brief characterizes, without figures, the number as "substantial" and "increasing" (p. 46; compare the vast number of other informal procedures referred to in n. 45 at p. 47).[17] In addition, such stimulants to litigious zeal as prospective emoluments of control are completely lacking. Thus, review proceedings are not likely to be prompted by anything less than a firm conviction that the Commission, in the particular case, has adopted an arbitrary interpretation which fails properly to reflect the policy of section 14 of the Exchange Act.

The brief for the Commission argues, however, that the rationale of the decision below is widely applicable to other proxy matters and to "other areas within the Commission's jurisdiction." Such sweeping application is explicitly rejected in the opinion below, "distinguishing between situations in which an agency gives informal advice and situations in

[17] The Committee's brief in opposition to certiorari gives a detailed breakdown based on the Commission's 1969 Annual Report for the year 1969 (pp. 3-4). We understand that the Committee's brief on the merits will supply additional figures.

which it formally decides among conflicting adversary claims premised on detail legal arguments." (App. 69)

There is ample basis for this distinction. As we have noted (*supra* pp. 16-19) the bulk of the Commission's informal advisory rulings in proxy matters, as in other areas of its responsibility, are confidential when rendered and ex parte, addressed to hypothetical or incomplete factual premises. These rulings are necessarily tentative and "no action" in substance as well as in form, since the Commission cannot purport to adjudicate the rights of parties not before it. The logic of the opinion below does not extend to these typical advisory rulings.[18]

(b) Review at the Instance of a Regulated Company Is Not a Necessary Consequence of the Decision Below and, If Available, the Possibility of Resort to It Is Remote

The brief for the Commission urges as a consequence of the decision below, "it would seem a fortiori that the company itself" could obtain court of appeals review of a contrary holding (p. 45-46). This appears in our view not an inevitable consequence of the decision below, but one which may be separately resolved, on the basis of weighing of quite different considerations. Reviewability at the instance of the company would seem to depend on whether a ruling unfavorable to the company carries some drastic threat of penal consequences, or is no more than a threat to bring

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[18] Assuming erroneous ex parte advice (no action or otherwise), that a security offering need not be registered, the remedy of the future purchaser, if he becomes aware of the violation, is to sue for recision. Even if the advisory ruling should be deemed an "order", Court of Appeals review would not apply since the purchaser was not a party to any proceeding which culminated in such advice. If available, such review would not be sought, because the purchaser's interest is in damages obtainable only in a district court. There would be similar difficulties in the way of contestants in a proxy fight seeking Court of Appeals review with respect to any ex parte advisory rulings concerning the disclosures in their adversaries' proxy statements, and similar preference for district court remedies.

an injunction suit in which the company will have adequate opportunity to contest the ruling by way of defense.[19] A relevant consideration might be whether the Commission had indicated an intention to move promptly for injunction, or appeared to be relying on the in terrorum consequences of its admonition to compel compliance.

Moreover, the problem is of only theoretical importance. As the Commission's brief indicates (pp. 11-12) the disadvantage to the company of being forced to include a proposal in its proxy statement is only "rarely" considered great enough to warrant district court litigation with the Commission. There is no reason to assume that the possibility of court of appeals review would be substantially more attractive.[20]

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[19] See *Ewing v. Mytinger & Casselberry Inc.*, 339 U.S. 594 and discussion of that case in *Abbott Laboratories v. Gardner*, 387 U.S. 145, 146-148.

[20] The brief for the Commission presents an ingenious supposition however (p. 45-46) that "a management that expected to be voted out of office" might want to delay the meeting and could compel such delay by challenging "Commission advice that its proxy materials are deficient." This supposition appears to assume a contested election rather than a dispute over a security holder proposal. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, indicates that in the absence of imminent proceedings for injunction and where a threat of penal consequences exists (in that instance potential revocation of, or refusal to renew a license) even an informal letter ruling constitutes the recipient sufficiently "aggrieved" to warrant review. If there is any basis for concluding that Court of Appeals review would extend to a SEC warning that a proxy statement is "deficient", in the sense of being misleading, that consequence stems from possible extension of *Red Lion*, and not from the ruling in the instant case. In any event, there is no reason to assume that statutory review proceedings, as compared to proceedings in a district court, involve the greater risk of improvident judicial restraints. Section 25(b) expressly provides that the commencement of a review proceeding "shall not unless specifically ordered by the court, operate as a stay of the Commission's order." A fortiorari there would be no automatic stay extending beyond the "order" to the corporate meeting particularly where review is at the instance of a management and the opposition group is prepared to go forward with the meeting.

VIII

EXPERIENCE WITH THE ADMINISTRATION OF RULE 14a-8 DEMONSTRATES THE NEED FOR COURT REVIEW

(a) There Is Need for Articulated Commission Opinions Reconciling Its Interpretation of the Rule, Particularly the Limitations Involved in This Case, with the Congressional Purpose To Provide Fair Corporate Suffrage.

The Court below concluded that judicial review, limited to examining "the legal framework in which discretion must be exercised" was warranted "to assure that the investing public can obtain vigorous, efficient, and evenhanded implementation of the concepts of corporate democracy embodied in the proxy rules." (App. 67-68).

While the discussion of the merits of the Commission's determination is not challenged by the petition and is not directly at issue, some consideration of the merits of this particular decision, and of the Commission's administration of the Rule is none the less relevant to show the need for judicial review in this area.

There are no published Commission opinions interpreting the Rule; and the only published staff interpretation antedates the limiting amendments relied on by Dow.[21] To obtain a comprehensive view of the Commission's administration since addition of these limitations, it is necessary to piece together a variety of not always consistent statements and writing of individual commissioners, staff members and former staff members, and Commission minutes which have been made available to writers in the area, but were prepared for internal record keeping purposes, and not as formal opinions for public distribution.

Reviewing some of this source material, the opinion below noted criticism of the Commission's administration of Rule

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[21] See Exchange Act Release No. 3638 January 3, 1945 quoted in part App. 73.

14a-8 for "violating its own established procedural principles, particularly those relating to management's burden of proof—of affording inconsistent treatment of similar factual situations for no apparent reason." It noted further that "the lack of articulated basis for past decisions encourages management to file shotgun objections to a shareholder proposal urging every mildly plausible legal argument that inventive counsel can contrive..." with the result that "the shareholder often has no idea why his proposal was deemed unworthy or what he can do to cure its defects..." App. 67. There was thus a crying need for the Commission to shed some light in the murky area of the application of Rule 14a-8. Indeed, informality of procedures, and absence of articulated decisions by the Commission in this area appeared to have encouraged management's evasion of the salutory purposes of the rule, rather than to have aided compliance.[22]

(b) The Discussion of the Merits by the Court Below Further Illustrates the Need for Review.

Turning to the merits of the Commission's decision in the instant case, the court rejected as without foundation the contention that state law prevented stockholders from voting on an amendment limiting the scope of Dow's business (App. 76-77).[23] This disposed of Dow's reliance on

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[22] The court below referred specifically to Clusserath, the Amended Stockholder Proposal Rule: A Decade Later, 40 N.D. Lawyers 13 (1964). Since the opinion below, published studies of the Commission's administration of Rule 14a-8 have confirmed the need for an official statement of Commission views to articulate the rationale of seemingly inconsistent disposition of recurrent controversies in its administration. See Schwartz, *supra*, 69 Mich. L.R. 419, 443, 451, 84 Harv. L.R. 835, *supra* 842-844.

[23] See also Del. Code Title 8 § 141a (Supp. 1968), which provides "the business of every corporation organized under the provision of this chapter shall be managed by a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

clause C(5) excluding proposals "relating to the conduct of the ordinary business operations of the issues." As to that the ordinary business operations of the issuer." As to that representation to the Congress that "ordinary business operations" must have the meaning attributable to it under applicable state law (App. 76-77. The opinion refers to testimony of former Chairman Armstrong quoted in part at p. 74).

The Court then dealt with the other exclusionary limitation relied on by Dow, subparagraph (c)(2) which permits omission "if it clearly appears that the proposal is submitted primarily for the purpose . . . of redressing a personal grievance . . . or promoting general economic political, religious, social or similar causes."[24] The court considered the "pos-

[24]This provision was construed by former Director Baldwin Bane as intended to write into the rule the substance of his prior interpretation published in Exchange Act Release No. 3638, *supra* p. 28. See a letter to the Society of Corporate Secretaries cited in Schwartz *supra*, p. 422, n. 108. So construed, subparagrpah (c)(2) merely excludes basically irrelevant proposals not within the competence of stockholders. Unfortunately the language is also susceptible of the interpretation that it permits rejection because it may be surmised that the security holder with an otherwise appropriate proposal may be suspected of concern for having the corporation operate in what he regards as a socially responsible way. A review of the administration of this exclusion shows vacillation between decision discriminating against proposals by stockholders apparently because assumed to have social motives, and decisions ignoring subjective motivation, but looking only to the effect of the proposal as properly within the competence of a stockholder vote. See *Schwartz, supra,* 68 Mich. L. R. 419, pp. 436-462. Commission and staff rulings subsequent to that involved in the instant case, have apparently reflected greater tolerance for proposals which might be regarded as having some social importance. See discussion of the General Motors Decision in *Schwartz supra* at pp. 451-453 noting disagreement as to this ruling between the Commission's General Counsel and its Division of Corporation Finance and a two to one split among Commissioners.

sibility" that this could support the omission "somewhat more substantial" (App. 77). Examining the matter more closely however, the court found Dow's attempt to show the applicability of this provision only a "fundamentally irrelevant recitation" of some political protests not attributable to the Committee (App. 77). The court concluded that management's assertion of intention to continue the making and sale of napalm as "morally and politically desirable", in spite of adverse effect upon the company's business relations and recruitment activities could not be excluded from control of stockholders. Such a result could not be "harmonized with the philosophy of corporate democracy which Congress embodies in section 14 of the Exchange Act" (App. 79).[25]

The vulnerability to criticism of the Commission's administration of Rule 14a-8, at least since the addition of the two limiting provisions involved in the instant case, contrasts with the almost uniformly favorable comment which it has received for its administration generally. This suggests that the assumed freedom from judicial review for this area of its administration as expounded in the brief for the Commission (at p. 37-38) has not had an altogether healthy consequence.[26]

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[25] *Schwartz* attributes the introduction of the test of primary purpose to an "understandable reaction to much of the abuse it [the Commission] received in respectable quarters for ever having adopted the Rule," and notes that the discrepancy between this language and the statutory purpose of promoting corporate democracy has had unfortunate policy results. Conversely, the line of Commission precedents disregarding speculations as to "motive" and testing a proposal objectively by its effect may reflect recurrent recollection on the Commission's part of the need to construe the rule in conformity with statutory policy.

[26] The brief for the Committee (Part III(c)) shows that the authorities cited do not establish the assumed immunity from judicial review.

VIII

THE DECISION DOES NOT IMPOSE AN UNREASONABLE BURDEN OF FORMALIZATION IN THE AREA TO WHICH IT APPLIES.

In view of the inadequacy of Dow's opinion as relied on by the Commission and its staff, the failure of Dow to intervene in the review proceeding to defend that opinion, the statement of Commission counsel that it lacked authority to defend the Commission's ruling on the merits, even after its preliminary motion to dismiss had been denied, the court below would have been fully warranted in putting an end to the controversy by merely reversing on the ground that Dow had not sustained its burden of proof. We submit, however, that the Commission is scarcely in a position to complain that the court below, out of respect for the administrative process, has afforded the Commission an opportunity to re-examine its decision in the light of the court's opinion.

It may be inferred from the failure to defend the decision on the merits, from Commission rulings in other security holder controversies since the decision below, or from the persuasive force of the discussion of the merits in the opinion of the court below, that the Commission on remand may conclude that Dow's proposal is one which the Rule 14a-8 requires to be included. If that be the case, there is no burden in giving the Commission an opportunity to say so. If, on the other hand, there are good reasons for the Commission to conclude that the proposal was properly omitted, it should welcome an opportunity to expound those reasons.

As to the future decisions in agreement with a company's refusal to include a stockholder proposal, the only burden on the Commission is to insist that the company state adequate grounds as the rule requires. If the grounds urged by the company are inconsistent it is not too burdensome to require that the Commission or its staff indicate a choice between the inconsistent company arguments. Formal Commission opinions should only be necessary where major

problems of uncertainty develop as a result of inconsistent rulings. Even in such cases, if time pressures are great, the opinion may follow decision.

IX

REVIEW UNDER SECTION 25 EXTENDS TO DELEGATED DECISIONS WHICH ARE DENIED REVIEW BY THE COMMISSION

The opinion below observes "here, the full Commission has exercised its discretion to review this controversy" (App. 68), and intimates that the availability of Court of Appeals review "depends upon the Commission's initial determination to review the staff decision" page 30(a). The briefs for the Commission have urged that "the Court's rationale suggests that direct appellate review also would be available where the Commission merely declined to review its staff's decision rather than, as in the present case, declined to overrule it." See, Reply Brief in support of petition, p. 2. See also, brief for the Commission on the merits, p. 47 n. 44.

Upon this one point, amicus curiae support the position of the Commission, subject to the qualification that a person seeking review must first exhaust his administrative remedy by attempting to get Commission review of any delegated staff authority. We submit that there is not a policy distinction between staff delegated authority, which becomes final on failure of the Commission to review it, and a Commission determination upon review of an initial determination of the staff.

Assuming efficient administration by the Commission refusal of review by the Commission will reflect a judgment that the staff decision conforms to Commission policy, and there is then no meaningful distinction between affirmance and denial of review. Assuming that the Commission inadvertently, or arbitrarily, declines to review a staff decision which does not conform to Commission policy, the probability of error and hence the need for judicial review is the greater. In either event an unreviewed determination at a

delegate level has the same immediate effect as a determination of the Commission and should be deemed, the action of the Commission. While not specifically applicable, we believe to be relevant, the policy of Section 8(a) of the Administrative Procedure Act, under which an unreviewed decision of a hearing officer may become "the decision of the agency."[27]

As the above cited Harvard Law Review note observes at pp. 864-5:

> "... if the subject of the determination is not committed by law to agency discretion when the full Commission chooses to review the Division recommendation, it is difficult to understand how it is made any less appropriate—or how the need for review is diminished—by the Commission's refusal to review. The practical consequences of the "no-action" decision are the same for the shareholder regardless of whether the Commission has granted review and affirmed or simply denied review without consideration of the merits. Consequently, the Commission's decision to grant or not to grant review of the staff's determination should not control the availability of direct judicial relief.

See also, Note in 57 Va. L. Rev. 331, 340 (1971).

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[27] It may be noted that in important areas where the Commission has specifically delegated authority for decision making to the staff, it has expressly provided for Commission review at the instance of any party or intervenor or on the Commission's own initiative; otherwise the delegated decision has immediate effect and is deemed the action of the Commission. See Rule XXVI of the Commission's Rules of Practice. While this rule is not specifically applicable, once the Commission faces up to resolution of basic issues of policy, if need be by amendment of Rule 14a-8, its review of staff decisions need not be burdensome. This follows from the recurrent nature of the problems and the absence of factual issues.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September 1971.

BRIEF FOR RESPONDENT

Supreme Court, U.S.
FILED
SEP 17 1971
CLERK

No. 70-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

SECURITIES AND EXCHANGE COMMISSION, *Petitioner*,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit

BRIEF FOR THE MEDICAL COMMITTEE FOR HUMAN RIGHTS

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September 1971

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT	2
A. The Exchange Act and the Proxy Rules	2
B. The Proceeding Before the Commission	8
C. The Court of Appeals Review	12
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. The Commission's Action Rests Upon a Legal Determination of the Kind Customarily Subject to Judicial Review, and Review of That Determination Does Not Infringe Upon "Agency Discretion"	17
A. The Commission's Action Embodies a Legal Determination	17
B. "Agency Discretion" Does Not Foreclose Review	21
II. Under the Plain Language of Section 25(a) and the Controlling Decisions of This Court, the Court of Appeals Had Jurisdiction To Review the Commission's Legal Determination	25
A. The Statutory Prerequisites for Review Have Been Met	25
B. Congressional Intent Is Consistent With Direct Review, and the Presumption of Reviewability Applies	34
C. Precedent Does Not Support the Commission's Restrictive "Gloss" on Section 25(a)	37
III. The Court of Appeals Is the Most Appropriate Forum for Review of the Commission's Legal Determination, and an Injunction Suit in the District Court Does Not Afford Stockholders an Adequate Remedy	42
A. The Court of Appeals Is the Most Appropriate Forum	42
B. The District Court Injunction Suit Is Not an Adequate Remedy	46

Page

IV. Direct Judicial Review Will Not Impose a Significant Burden on the Commission, and Such Review Will Improve Existing Administration of Rule 14a-8 51

A. No Significant Burden Will Result From Judicial Review 51

B. Judicial Review Will Improve Administration of Rule 14a-8 56

CONCLUSION 60

TABLE OF AUTHORITIES

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Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) .....*passim*
Amalgamated Utility Workers v. *Consolidated Edison*, 309 U.S. 261 (1940) 36
American Sumatra Tobacco Corp. v. *SEC*, 93 F.2d 236 (D.C. Cir. 1937) 45, 51
Auto Workers v. *Scofield*, 382 U.S. 205 (1965) 36
Banzhaf v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) 57
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Bellanca Corp., 38 S.E.C. 405 (1958) 7, 29
Brooks v. *Standard Oil Co.*, 308 F. Supp. 810 (S.D.N.Y. 1969) 45, 47, 49
Burlington Truck Lines v. *United States*, 371 U.S. 156 (1968) 20
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Page

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Mougios v. *W.R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D.N.Y. 1971) 45, 46
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Page

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Page

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17 C.F.R. § 200.18 (1971) 6, 27
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Rule 14a-6(a) 44
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Rule 14a-8(a) 8, 26, 33, 59
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Rule 14a-8(c)(2) 9, 10, 17, 50, 59
Rule 14a-8(c)(3) 50, 59
Rule 14a-8(c)(4) 50, 59
Rule 14a-8(c)(5) 9, 10, 17, 59
Rule 14a-8(d) 10, 26, 44, 48
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-61

SECURITIES AND EXCHANGE COMMISSION, *Petitioner,*

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR THE MEDICAL COMMITTEE FOR HUMAN RIGHTS

QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Securities and Exchange Commission's legal determination that under the SEC's "stockholder proposal" rule a particular stockholder proposal may lawfully be omitted from the company's proxy materials.

STATEMENT

A. The Exchange Act and the Proxy Rules

The issue presented in this case, long ago described as a "recurrent central issue" in administrative law,[1] is the reviewability by the courts of an administrative determination. The nature of the Securities and Exchange Commission's determination in this case and its reviewability will be illuminated by first considering the regulatory framework within which the Commission acted.

Prior to passage of the federal securities laws, the growth of large corporations had led in many cases to a divorcement of stockholder ownership from corporate control. As stockholders increased in numbers and became scattered geographically, many were unable to attend their company's annual meeting to elect directors and make the major policy decisions reserved by law to stockholders. Voting by proxy thus became the rule rather than the exception for the ordinary stockholder. See generally Berle & Means, *The Modern Corporation and Private Property* 47-125 (1932).

Management's ability in these circumstances to solicit proxies from all stockholders to be used at the management's discretion at annual meetings became the pivot of control. Using corporate funds for such solicitations, the managers were enabled to perpetuate themselves as directors and to dictate the stockholders' policy decisions at annual meetings virtually without hindrance. The abuses that followed were a principal

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[1] See *Final Report of the Attorney General's Committee on Administrative Procedure* 75 (1941). The report (hereafter "*Attorney General's Report*") is reprinted as S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

concern of the Congress that enacted the Securities Exchange Act of 1934.[2]

Section 14(a) of the Act, 15 U.S.C. § 78n (1964), in sweeping terms forbade the solicitation of proxies of the large corporations "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." As its legislative history shows, the purpose of Section 14(a) was to eliminate past abuses by assuring "fair corporate suffrage" in the future. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934); *J. I. Case Co.* v. *Borak,* 377 US. 426, 431 (1964). Through regulation, Congress sought to assure that stockholders would henceforth be "enlightened . . . as to the major questions of policy which are decided at stockholders' meetings."[3]

Within two years after the Act, the Commission announced its first set of proxy rules pursuant to Section 14(a). 2 Loss 868. Almost from the outset, the Com-

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[2] 15 U.S.C. § 78a *et seq.* (1964) (hereafter "the Act"). See *SEC* v. *Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied,* 332 U.S. 847 (1948): "The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a) [of the Act]."

[3] S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934). The report continued: "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Id.* In aiming to enlighten balloting stockholders, Congress' design in Section 14(a) was consonant with the pervading philosophy of the securities laws to assure full disclosure in all matters affecting investors. See Douglas, "Protecting the Investor," 23 *Yale Rev. (N.S.)* 521, 523-24 (1934); 1 L. Loss, *Securities Regulation* 122-28 (1961) (hereafter "Loss").

mission took the position that, when a stockholder intended to propose a lawful corporate action at the company's annual meeting and so informed the management, management must disclose the proposal in the proxy statement which it distributed in advance of the meeting at company expense. Since management used the proxy statement to solicit proxies to vote on matters presented, this disclosure served elementary fairness by informing the solicited stockholders of the proposals on which their proxies would be voted. The Commission therefore ruled that to omit known stockholder proposals would render the proxy statement false and misleading.[4]

More broadly, disclosure of stockholder proposals in the company proxy statements served to give minority stockholders access to other stockholders. Recognizing that stockholders today "can only address the assembled proxies which are lying at the head of the table" (*1943 Hearings* 174 (Chairman Purcell)), the Commission designed its rules to make the proxy machinery "the closest practicable substitute for attend-

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[4] The Commission made such a ruling pursuant to its proxy rule forbidding "false and misleading" proxy statements when an instance of this kind came to its attention during the 1938-1939 proxy season. See *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 1493*, 78th Cong., 1st Sess. 169-70 (1943) (hereafter *"1943 Hearings"*). In 1940, the Commission announced that it was "seriously concerned" about management's responsibility to communicate such proposals to the stockholders and amended its rules to provide specifically that the proxy statement should include "any matters which the persons making the solicitation are informed other persons intend to present for action" at the meeting. Sec. Ex. Act Rel. No. 2376 (Jan. 12, 1940).

ance at the meeting."[5] Thus, when the Commission promulgated its first full-fledged stockholder proposal rule in 1942, it required not only that management's proxy materials disclose in advance of the meeting all stockholder proposals on "proper subjects" for action but also, if management intended to oppose any such proposal, that it include in the company's proxy materials a 100-word supporting statement prepared by the proposing stockholder. Sec. Ex. Act Rel. No. 3347 (Dec. 18, 1942). Given this advance notice of intended stockholder proposals, the other stockholders of the company could vote for or against such proposals either by proxy or in person, and the stockholder proposal rule thus restored a measure of corporate democracy.

Over the course of years the basic approach of the stockholder proposal rule—now codified as Rule 14a-8, 17 C.F.R. § 240.14a-8 (1971)—has remained unchanged but two significant developments have occurred. First, following the original requirement in 1942 that any proposal on a "proper subject" for stockholder action be included, a series of refining and delimiting exceptions have been incorporated into the rule from time to time, so that today Rule 14a-8(c) includes five detailed exceptions, several of which contain more than one ground for excluding a proposal.

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[5] 2 Loss 869. In substance, "a shareholder in a publicly held corporation will make his voting decision at some point during the solicitation process rather than at the meeting and . . . [any] persuasion will occur during the solicitation process rather than at the meeting." Eisenberg, "Access to the Corporate Proxy Machinery," 83 *Harv. L. Rev.* 1489, 1494 (1970).

Second, a related development was the establishment by the Commission of detailed procedures governing management-stockholder disputes about the excludibility of proposals. Most importantly, these procedures—which the agency itself has described as "formal procedures" (17 C.F.R. § 202.2(b), (c) (1971))—require that management must submit the stockholder's proposal to the Commission in the event management asserts the proposal may be excluded. Rule 14a-8a(d). Other provisions, discussed below, specify the timing of the submission, call for notice by management to the stockholder, and require management to provide both the Commission and the stockholder with a written statement of its reasons for exclusion and a supporting legal opinion of counsel. See pp. 8-11, 26-27, *infra.*

When a dispute under Rule 14a-8 is submitted to the agency, it is initially considered by the Division of Corporation Finance (17 C.F.R. § 200.18 (1971)), to which legal arguments may be submitted by the stockholder in response to management's statement and opinion of counsel. With such materials in hand the staff can and normally does reach an administrative judgment whether the stockholder or management is correct. The Commission may in turn review the staff judgment and "in a number of cases" has heard oral argument and received legal briefs from the private parties "to aid it in its determination . . . ." *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on SEC Enforcement Problems,* 85th Cong., 1st Sess., pt. 1, 118 (1957) (hereafter *"1957 Hearings"*) (SEC Report to Subcommittee).

In practice management has almost invariably accepted the staff or Commission determination as to

whether a disputed proposal has to be included or whether it falls within one of the specified exclusions in the rule. Schwartz, "The Public-Interested Proxy Contest: Reflections on Campaign GM," 69 *Mich. L. Rev.* 419, 434 (1971). Such acquiescence by management is typical of the Commission's administration of all its proxy rules.[6] As to stockholder proposals in particular, the Commission has had to take court action to compel inclusion exactly once in its history, and that more than 20 years ago. *SEC* v. *Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948).

In the unlikely event that management were obdurate in refusing to include a proper stockholder proposal, the Commission has manifold remedies. It may institute an injunction action to compel compliance as it did in *Transamerica*, or it can take any of several administrative measures including the delisting of the company's securities. See *Bellanca Corp.*, 38 S.E.C. 405 (1958). The Commission in blatant cases can even request the Attorney General to begin criminal prose-

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[6] See *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on S. 879*, 84th Cong., 1st Sess. pt. 3, 1540-48 (1956) (hereafter *"1956 Hearings"*) (testimony of Chairman Armstrong). As Chairman Purcell observed in the early years of the Commission, when the Commission discovered failures to comply with its proxy rules and advised management that the violations must be remedied, "it was almost always done." See *1943 Hearings* 81-82. In succeeding years voluntary compliance has been attained in the "overwhelming majority" of cases. 2 Loss 931. As the Commission's own brief explains, companies "generally" comply because "their primary objective is to insure prompt distribution of the proxy material with a measure of assurance that the Commission will not institute an injunctive action" (Br. 8).

cution. See generally Sections 19-21 of the Act, 15 U.S.C. §§ 78s-78u (1964); 2 Loss 931-32.[7]

B. The Proceeding Before the Commission

In January 1969, the Medical Committee for Human Rights (hereafter "Medical Committee"), a stockholder in Dow Chemical Company (hereafter "Dow"), invoked Rule 14a-8 by sending to Dow a proposed stockholder resolution for inclusion in the company's proxy statement to be distributed for the May 1969 meeting (A. 10).[8] As finally phrased, the proposal contemplated a stockholder's resolution that would request the Dow management to consider adopting an amendment to Dow's certificate to preclude the company from manufacturing napalm (A. 18).

The Medical Committee informed Dow that the Medical Committee believed, among other objections, that manufacture of napalm was "bad for our company's business" (A. 8). Although Dow's management fully recognized the significant business problems posed by its manufacturing of napalm and had once considered terminating production,[9] it declined to include the pro-

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[7] While the Commission repeatedly asserts that an injunctive action is its sole means to "compel" compliance with the proxy rules (Br. 8, 11, 15), the more severe sanctions such as delisting and criminal penalties do exist for repeated or gross violations, and their availability may partly explain the high degree of voluntary compliance by companies with the Commission's non-coercive proxy rule determinations.

[8] Rule 14a-8(a) requires the stockholder to submit his proposal 60 days in advance of distribution of the proxy statement. A similar proposal had been submitted to Dow by the Medical Committee in 1968 but had been rejected by Dow as untimely (A. 8).

[9] See statement of H. D. Doan, president of Dow (A. 37-39); New York Times, Feb. 10, 1969 (A. 29). See generally D. Whitehead, *The Dow Story* 263-71 (1968).

posal (A. 14). In a letter signed by its counsel (A. 12), Dow asserted that the Medical Committee's proposal was subject, simultaneously, to the exclusion relating to "general causes" (Rule 14a-8(c)(2)) and that governing "ordinary business" operations. Rule 14a-8 (c)(5).

The first of these two exclusions allows management to omit from the company proxy statement a proposal where "it clearly appears" that the proposal was submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes." Rule 14a-8(c)(2).[10] The second allows exclusion where the proposal consists of a recommendation or request that management act respecting a "matter relating to the conduct of the ordinary business operations" of the company. Rule 14a-8(c)(5).[11]

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[10] The "general cause" exclusion was first stated in a release issued in 1945. Sec. Ex. Act Rel. No. 3638 (Jan. 3, 1945). As the release noted, it was stimulated by a specific stockholder proposal that the company's stockholders pass resolutions calling for the revision of the tax and antitrust laws of the United States and other Congressional reforms of the same nature. Affirming that the stockholder proposal rule did not embrace such abstract demands, the release stated that the purpose of the rule was "to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders . . . . [and not] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature."

[11] The purpose of the "ordinary business" exclusion adopted in 1954 (Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954)) was apparently to avoid proposals relating to the day-to-day administrative and technical problems of management which are outside the competence of stockholders. The Commission later explained that the "basic reason" for this exclusion is that "it is manifestly impracticable" in most cases for stockholders to resolve ordinary business problems at corporate meetings. *1957 Hearings* 118 (SEC Report to Subcommittee).

When Dow determined, on the basis of its own interpretation of the exclusionary rules, to exclude the Medical Committee proposal, it was obligated under Rule 14a-8(d) to submit the dispute to the agency by filing the Medical Committee proposal with the Commission at least 20 days before Dow would normally file its preliminary copies of its proxy statement. As the Commission has stated, one reason for this advance filing is "so that the Commission will have more time to consider the problems involved in such cases . . . ." Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954). The rule also required Dow to supply the Commission with a statement of reasons for the exclusion and, since the reasons related to issues of law, to furnish an opinion of counsel in support of the reasons.

When Dow submitted its proposal to the Commission, together with a statement of reasons and opinion of counsel (A. 13-14), Rule 14a-8(d) required Dow "at the same time" to notify the Medical Committee of its determination and furnish it a copy of the statement of reasons and opinion of counsel filed with the Commission. This enabled the Medical Committee to file promptly a responsive statement with the Commission (A. 16), and Dow in turn filed a reply (A. 19).

On February 18, 1969, the Commission's Division of Corporation Finance informed both Dow and the Medical Committee as follows:

> "For reasons stated in . . . [Dow's] letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material for the Company's annual meeting pursuant to Rules 14a-8(c)(2) and 14a-8(c)(5) under the Securities Exchange Act of 1934" (A. 21).

The Medical Committee requested that the Division's determination be reviewed by the Commission itself (A. 23), and it submitted a letter-memorandum arguing the issue of includibility at length and supplying appropriate legal citations (A. 26). In particular, the Medical Committee asserted that application of the "general cause" exclusion was inconsistent with the language and the controlling purpose of the exclusion (see p. 9, n. 10, *supra*), and it proffered prior interpretative statements of the Division to show that the "ordinary business" exclusion furnished no possible basis for omitting a proposal concerning a legitimate, significant certificate amendment (A. 27). Dow responded with an answering letter to the Commission addressed to the "general cause" issue (A. 31), and the Medical Committee submitted a reply on the same issue (A. 34).

The Commission exercised its discretion to review its staff's determination, and by letters dated April 2, 1969, both Dow and the Medical Committee were formally informed that "the Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised" to Dow's omission of the Medical Committee's proposal from the proxy statement (A. 42-43).[12]

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[12] The Commission considered the recommendation on March 24, 1969, when it entered a minute in its records stating in relevant part: "Upon the recommendation of the Division of Corporation Finance . . . the Commission determined to raise no objection to the omission" of the proposal (A. 44). The Medical Committee sought a copy of this minute but was not furnished a copy until almost four weeks after the request (A. 51).

C. The Court of Appeals Review

Within 60 days of the Commission's letter of April 2, 1969, the Medical Committee filed a petition in the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 25(a) of the Act, 15 U.S.C. § 78y(a)(1964), and it expressly sought review only of the Commission's legal determination that the proposal could lawfully be omitted (A. 4). Section 25(a) provides in pertinent part that "any person aggrieved by order of the Commission in a proceeding under . . . [the Act] to which such person is a party may obtain a review of such order" by filing a petition with the court of appeals within 60 days.

After certifying the relevant documents to the court of appeals (A. 5), the Commission moved to dismiss the Medical Committee's petition on the ground that the court of appeals lacked jurisdiction to review the Commission's determination. In its accompanying brief, the Commission argued that its determination was not a reviewable order within the meaning of Section 25(a) and was in any event related to matters within the Commission's sole discretion (A. 44). The Commission's brief also observed, but explicitly declined to "urge," that the petition might be considered untimely because filed more than 60 days after the Commission's *in camera* minute and, additionally, that it might be considered moot since Dow's annual meeting had already been held. SEC Mem., July 1969, p. 5.

Following briefing and oral argument on the jurisdictional issue, the court of appeals denied the motion to dismiss without prejudice to its renewal when the case was heard "on the merits" (A. 45). The Medical Committee thereafter briefed the merits of the question

whether on a proper interpretation of Rule 14a-8 its proposal was excludible from Dow's proxy statement. The Commission's answering brief specifically declined to argue the merits and addressed itself once again solely to the court's jurisdiction. This time, however, its brief also included a full-blown argument that the petition should be dismissed as untimely.[13]

The court of appeals rendered its decision on July 8, 1970 (A. 47). 432 F.2d 659. After swiftly disposing of the timeliness objection (A. 51-53), the court canvassed the decisions of this Court and other relevant precedents on the question whether a reviewable order existed. Based on those authorities, it concluded that the Commission's legal determination was administratively final, that the agency proceeding was sufficiently formal to give rise to a reviewable order, and that the adverse impact on the Medical Committee's protected interests was substantial (A. 53-65). Since review was sought only as to the legal determination, the court held that review involved no infringement of the Commission's discretionary authority (A. 65-70).

The court of appeals' opinion then examined the merits of the administrative determination as to the meaning of the stockholder-proposal exclusions. Since the Commission has sought certiorari here only on the question of reviewability, it is enough to note that

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[13] On this issue, the Commission relied on an affidavit by a SEC staff attorney asserting that he had informed a Medical Committee official and its lawyer by telephone of the Commission's action on the day it had entered its private minute (A. 51). The Commission did not dispute that the Medical Committee's petition was filed within 60 days of the letter reporting the Commission's action to the Medical Committee, nor that the minute itself was not made available to the Medical Committee until well after the letter. (A. 52).

the court below, considering the exclusions in light of their own language and purpose together with the underlying Congressional intent, found no sound basis for exclusion of the Medical Committee's proposal under either of the two exclusions invoked (A. 70-79). Out of an abundance of caution, the court of appeals remanded the case to the Commission so that it might "reconsider" the question in light of the court's opinion (A. 80).

Following the court of appeals' decision, Dow in January 1971 agreed to include the Medical Committee's resubmitted proposal for inclusion in Dow's May 1971 proxy statement; Dow agreed to do so without prejudice to its right to reassert at any time that Rule 14a-8 did not require inclusion. In reporting the event to this Court pending certiorari, the Commission took the position that the mootness doctrine did not preclude review since Dow has maintained its legal position and might reject the proposal in future years. SEC Reply Br., February 1971, p. 5.

At the Dow meeting of May 1971 the Medical Committee's proposal, which was included in the company's proxy statement, was defeated by a vote of 22,570,300 shares to 654,237 shares. It is the Medical Committee's intention to propose its resolution again.

SUMMARY OF ARGUMENT

As required under rules established by the Commission, Dow submitted to the Commission a disputed stockholder proposal which the Medical Committee had requested Dow to include in the company's annual proxy statement. Rule 14a-8. After receiving the legal contentions of both parties, the Commission's

staff explicitly determined that Rule 14a-8 allowed Dow to exclude the proposal on the legal grounds advanced by Dow, and the Commission, in reviewing the staff determination, in substance adopted the staff's legal position. Review of the Commission's legal determination by the court of appeals was not foreclosed by "agency discretion" since such review related only to a legal question and did not concern or trammel the Commission's enforcement authority. *McGrath* v. *Kristensen,* 340 U.S. 162 (1950); *Perkins* v. *Elg,* 307 U.S. 325 (1939).

The Commission's determination in this case was properly subject to review in the court of appeals under Section 25(a) of the Act. The determination constituted an "order" for purposes of review (*Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1970)) and met each of the other statutory prerequisites. There is no evidence that Congress intended to foreclose review of the type of determination made here, and the presumption of reviewability recognized by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), accordingly governs. The restrictive "gloss" that the Commission seeks to impart to the Act is inconsistent with the remedial approach taken by this Court in *J. I. Case* v. *Borak,* 377 U.S. 426 (1964), and is not supported by any of the authorities cited by the Commission.

Direct review of the Commission's determination by the court of appeals is consonant with that court's jurisdiction over other SEC orders and is the method Congress has generally deemed most suitable for review of agency decisions. H. R. Rep. No. 2122, 81st Cong., 2d Sess. (1950) (Judicial Review Act of 1950). Such

review will operate in the normal instance to provide the stockholder with efficient, inexpensive review and, where he is successful, with full and effective relief. The alternative of a district court injunction suit by the stockholder against the company is not adequate to protect stockholder rights because of time limitations, stringency in granting equitable relief, and the difficulty of overcoming the Commission's adverse determination in its absence. In any event, the possible availability of such a remedy does not preclude resort to direct court of appeals' review pursuant to statute.

The prediction that direct judicial review will result in a significant administrative burden for the Commission is not consistent with experience. *Office of Communication of the United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966). The facts show that such review of stockholder proposal determinations will be sought only in a limited number of instances, and such review neither compels, nor implies the propriety of, review in other dissimilar situations. Direct review will serve the interests which Congress sought to secure through Section 14(a) of the Act and which this Court recognized in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), and will improve administration of the stockholder proposal rule by providing judicial guidance to the Commission.

ARGUMENT

I. THE COMMISSION'S ACTION RESTS UPON A LEGAL DETERMINATION OF THE KIND CUSTOMARILY SUBJECT TO JUDICIAL REVIEW, AND REVIEW OF THAT DETERMINATION DOES NOT INFRINGE UPON "AGENCY DISCRETION."

A. The Commission's Action Embodies a Legal Determination

It may clarify discussion to dispose at the outset of several matters collateral to the core issue of reviewability. As its opinion makes clear, the lower court concluded that the Commission, in accepting its staff recommendation concerning the Medical Committee's proposal, must be deemed to have acted upon a "legal theory" (A. 68).[14] While the Commission's own brief has suggested that the "precise basis" of the Commission's action in this case cannot be known (Br. 24), by any fair and reasonable test the court of appeals correctly charged the Commission with having resolved the legal question tendered to it.

Throughout the agency proceeding at both the staff and Commission levels, Dow, the Medical Committee and the Commission's own staff all treated the controversy as turning on the proper interpretation of Rules 14a-8(c)(2) and (5), which set forth the "general cause" and "ordinary business" exclusions. The staff rested its own determination squarely upon the

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[14] Because the Commission did review the proposal, the court of appeals was not required to determine whether the staff's action, which was explicitly based on legal grounds, would be reviewable standing alone. We do not believe that it is essential for this Court to resolve now any question concerning reviewability of staff action. As a matter of fact, however, the Commission has generally been willing to review the staff determinations on stockholder proposals whenever requested to do so by either the stockholder or the management. See statement of Chairman Budge, July 12, 1970, quoted at BNA Sec. Reg. & Law Rep., Sept. 16, 1970, p. D-3.

legal "reasons stated in . . . [Dow's] letter and the accompanying opinion of counsel" (A. 21), namely, the asserted application of the exclusions just cited (A. 21). The argument of both the Medical Committee and Dow to the Commission was directed solely to this question (*e.g.*, A. 24).

Since the Commission exercised its discretion to review its staff determination and expressly declared that "upon the recommendation" of its staff it would raise no objection to Dow's omission of the proposal (A. 43-44), there is every reason to conclude that it was acting on the only question raised: the proper interpretation of specified exclusions contained in its own stockholder proposal rule. In order to invoke court of appeals' authority to review the determination it would be sufficient if there were merely a reasonable *possibility* of legal error by the agency.[15] Here the events leading up to the Commission's action make its "legal premise" (A. 68) virtually a certainty. Whatever doubts the Commission may now seek to insinuate are, moreover, quickly dispelled by an examination of the legal context of its action.

The Commission's brief speculates that the Commission, in deciding to raise no objection to Dow's position, "might have concluded that, without a detailed study of the case, it could not firmly conclude that the rules required Dow" to include the Medical Committee's proposal (Br. 23). Yet the Commission

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[15] *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965); *Northeast Airlines* v. *CAB*, 331 F.2d 579, 587 (1st Cir. 1964). The principle that review is warranted wherever legal error *may* well have influenced the result below is not, of course, confined to agency action. See, *e.g.*, *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U.S. 19, 30 (1962) (error in jury instructions).

itself has explicitly affirmed that Rule 14a-8 "places the burden of proof upon the management" to show that a proposal may be excluded (Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954)); in the words of Chairman Gadsby, the Commission requires a "clear showing" before acquiescing in omission of a proposal.[16] In sum, if the Commission had not been able to "firmly conclude" the matter one way or the other, as its brief now suggests, then its own rules and practices would have compelled it to resolve the dispute in the Medical Committee's favor.[17]

There is even less substance to the alternative suggestion that the Commission "might have determined that, whatever might be the merits of the case, the issue did not warrant initiating an enforcement suit" (Br. 23). Whether or not the Commission might take this view if enforcement ultimately became necessary is beside the point;[18] for such an improvised hy-

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[16] Gadsby, "Current Problems in the Vital Area of Securities Regulation," 191 *Com. & Fin. Chron.* 1825, 1852 (1960). As the Commission has explicitly stated, "doubts are resolved in favor of the stockholder, and the management is required to include the proposal in the proxy material." *1957 Hearings* (Report of SEC to Senate Subcommittee). See also statement of Chairman Armstrong, *1956 Hearings* 1546; 2 Loss 904, 909.

[17] The Commission cannot, of course, ignore its own rules and practices on an *ad hoc* basis. See *Service* v. *Dulles*, 354 U.S. 363, 372 (1957); *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 629 (1950); *Cappadora* v. *Celebreeze*, 356 F.2d 1, 6 (2d Cir. 1966).

[18] It is surprising that its brief should ascribe such an attitude to the Commission, even on a speculative basis, when it is considered how important this Court has deemed protection of stockholder rights under Section 14(a). See, *e.g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). If this were the Commission's attitude, it would merely emphasize the urgency of direct judicial review. See pp. 58-59, *infra*.

pothesis cannot reasonably explain the Commission's failure at the outset to raise an objection which, according to its own experience, would almost automatically have been honored by Dow. See p. 7, *supra*.

More broadly, the conjectures now tendered by the Commission's brief conflict with its own explanation of its usual function in reviewing proxy submissions: in Chairman Armstrong's words (quoted Br. 25), the Commission normally determines, so far as it can ascertain from available information, whether the company has or has not failed "to comply with the standards of the proxy regulations." Having applied the "standards" of Rule 14a-8 to countless stockholder proposals over the last thirty years, the suggestion now that the Commission in this case has suddenly departed from the pattern and acted here on essentially non-legal grounds deserves even less weight than the usual "*post hoc* rationalizations" of appellate briefs. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1968).

It is, finally, quite significant that at no point in this litigation has the Commission itself ever asserted that in actuality it found the Medical Committee's proposal too close a case to resolve or its own resources inadequate to protect stockholder rights found scanted under Rule 14a-8. Nor has the Commission ever denied that its action rested upon a legal premise; instead it has adamantly refused either to explain or defend its action in any of its briefs. In these circumstances it would be unfair, as well as irrational, to allow the Commission to foreclose review by persistent silence as to its actual grounds of decision and by fanciful speculations about grounds it "might" have adopted.

B. "Agency Discretion" Does Not Foreclose Review

Since the Commission must fairly be charged with having acted upon a legal determination, it cannot plausibly be maintained that judicial review *limited to that determination* constitutes an invasion of matters reserved to agency discretion. In this instance, review of the Commission's legal premise was all that the Medical Committee asked (A. 4) and all that the court of appeals undertook (A. 80). The Commission's discretion relates to matters unaffected by the relief sought or granted, and this Court's decisions discussed below establish that agency legal determinations may be judicially reviewed whether or not they are made in the course of the agency's performance of a "discretionary" function.

The Commission's brief notes that Section 21(e) of the Act, 15 U.S.C. § 78u(e) (1964), provides that the Commission "may in its discretion" sue for injunctions to enforce the Act, and it seeks to bring the Commission's determination here within the cloak of this discretion by repeatedly implying that what the Medical Committee seeks is to compel the Commission to take "enforcement action" against Dow (Br. 9, 36, 41). Yet the Medical Committee has never requested the Commission to bring an injunction suit nor sought to dictate which if any of the various enforcement tools the Commission might employ in the conjectural event that Dow refused to include a stockholder proposal in disobedience to the views of the Commission. See pp. 12-13, *supra*. The discretion which the Commission might properly exercise in the face of such contumacy was not at issue in

this case and was freely acknowledged by the court of appeals (A. 65-70).[19]

Nor is judicial review of the Commission's legal determination precluded merely because such a determination might be made the premise for a Commission decision as to whether to seek injunctive relief or to take other discretionary enforcement measures. A line of decisions of this Court makes it plain beyond peradventure that an agency or executive official's legal determination is in no way insulated from judicial review simply because it relates to or is made in the course of exercising a "discretionary" function. *E.g., McGrath* v. *Kristensen,* 340 U.S. 162 (1950); *Perkins* v. *Elg,* 307 U.S. 325 (1939).[20]

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[19] Nevertheless, agency discretion in choosing whether to enter upon an administrative investigation or pursue a judicial remedy is less absolute than the Commission appears to believe. As the Administrative Procedure Act (hereafter "APA") indicates (Section 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (Supp. V, 1970)), and this Court has confirmed, "patent abuse" of discretion may be reviewable even in agency enforcement matters. See *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411, 414 (1958); *FTC* v. *Universal Rundle Co.,* 387 U.S. 244, 251 (1967).

[20] See also *Office Employees Int'l Union* v. *NLRB,* 353 U.S. 313 (1957); *ICC* v. *Humboldt Steamship Corp.,* 224 U.S. 474, 484 (1912); Saferstein, "Non-Reviewability: A Functional Analysis of 'Committed to Agency Discretion,'" 82 *Harv. L. Rev.* 367, 395-96 (1968). The *Attorney General's Report* (p. 86), citing the *Humboldt* case, summarized the governing principle thusly: "In some instances review may be unavailing because the determination of whether or not action should be taken in the circumstances may have been committed to the exclusive judgment of the administrator as to the public interest and convenience. But if the denial is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier."

Thus, in the *Perkins* case this Court reviewed a legal determination made by the Secretary of State in denying an applicant a passport on the ground of lost citizenship. The Court's opinion expressly acknowledged that as the law then stood the granting of passports was a "discretionary function," but it found that judicial review limited to the legal determination "would in no way interfere with the exercise of the Secretary's discretion . . . but would simply preclude the denial" on the basis of an erroneous legal theory. 307 U.S. at 349-50.[21] Similarly, in *McGrath,* the Court reviewed a legal determination of the Attorney General made in the exercise of his discretionary function of determining whether to suspend a deportation.

The Commission seeks to distinguish this long-standing line of authorities by arguing that such focused review of legal errors is confined to cases "where a statute specifies the standards" for exercising discretion, and it says that the "teaching" of *Schilling* v. *Rogers,* 363 U.S. 666 (1960), is that review even of legal errors is foreclosed when "the statute provides no standards" (Br. 39-40). If this were the test, review is well justified in this case since the standards relied on are contained in agency regulations promulgated pursuant to statute and having the force of law, and the legal standards fixed by Rule 14a-8 are quite as specific as the standards applied in *Perkins* or *McGrath.*

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[21] In Mr. Justice Jackson's pithy statement, under the principle of *Perkins* "the Secretary might say that . . . [Miss Elg] would get no passport but he could not, for unjustifiable reasons, say she was ineligible for one." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 185 n.5 (1951) (concurring opinion).

Moreover, the Commission's brief cannot be correct in characterizing the "teaching" of *Schilling,* since the statute there involved fairly bristled with standards. See 363 U.S. at 667-68, 675. The fair reading of *Schilling* is that, based upon the particular legislative plan and the relationship to foreign affairs, this Court perceived a deliberate Congressional intent to bar judicial review on any aspect of the executive action sought to be reviewed in that case. See 363 U.S. at 674; Jaffe, *Judicial Control of Administrative Action* 348 & n. 129 (1965) (hereafter "Jaffe"). As demonstrated below, there was no Congressional intent to preclude review in this case, and Congress' general policy squarely supports reviewability. See pp. 34-37, *infra.*

The Commission is equally infirm in relying on the "discretion" exception of the APA quoted in part in its brief (Br. 37). So far as is here relevant, that provision contemplates that there shall be judicial review of agency action "except *to the extent* that . . . agency action is committed to agency discretion by law." Section 10, 5 U.S.C. § 701(a)(2) (Supp. V, 1970) (emphasis added). In explaining this provision—which this Court has since characterized as "a very narrow exception," *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971)—the House Report on the APA neatly summarized the law applicable to this case:

> "Matters of discretion are necessarily exempted from the section . . . . [b]ut that does not mean that questions of law properly presented are withdrawn from reviewing courts." H. R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946).

The "all or none" conception of agency discretion, implicit in the Commission's argument here, has as

little support in policy as it does in law.[22] Agency "enforcement" discretion is rightly respected within wide limits when an agency, faced with the choice of litigating or investigating, fixes its priorities and makes its decisions based on budget and personnel considerations. See *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411 (1958). When agency action turns, however, not on such considerations but on an isolatable determination of law, no such policy of non-interference with agency discretion requires a court to stay its hand, and the very term "discretion" is out of place. See *ICC* v. *Humboldt Steamship Corp.,* 224 U.S. 474, 484 (1912).

II. UNDER THE PLAIN LANGUAGE OF SECTION 25(a) AND THE CONTROLLING DECISIONS OF THIS COURT, THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE COMMISSION'S LEGAL DETERMINATION.

A. The Statutory Prerequisites for Review Have Been Met

As the Commission agrees (Br. 28), Section 25(a) of the Act, read in conjunction with the APA and decisions of this Court, is unquestionably the governing jurisdictional statute. So far as here relevant, it provides that any person "aggrieved" by an "order" of the Commission in a "proceeding" to which the person is a "party" may obtain judicial review in the

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[22] 4 Davis, *Administrative Law* 33, 84-85 (1958) (hereafter "Davis"). As one court observed not long ago, "Almost every agency action involves some degree of discretion. Yet it cannot be said that, for this reason, every agency action is unreviewable." *Ferry* v. *Udall,* 336 F.2d 706, 711 (9th Cir. 1964), *cert. denied,* 381 U.S. 904 (1965). Compare *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 137 (1939): "[I]f the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

courts of appeals. Since the Commission's brief seemingly argues that all of the four elements are lacking in this case, it is appropriate to consider each of them in turn.

First, neither Section 25(a) nor the APA purports to limit the "proceeding" giving rise to a reviewable order to any fixed procedures, nor to specify any minimum degree of formality. Nevertheless, the presence of formalities usually supports reviewability, as the court of appeals recognized (A. 58-63). In this case, as in other stockholder proposal disputes under Rule 14a-8, highly structured agency procedures—which the Commission itself characterizes as "formal procedures" (see 17 C.F.R. §§ 202.2(b), (c)(1971))—governed most of the steps in sequence leading to the Commission's determination.

As previously noted, the stockholder proposal rule directs that the proposal itself must be submitted to management at least 60 days before the proxy statement is to be issued (Rule 14a-8(a)); it specifies what measures must be taken if management includes the proposal but plans to vote against it (Rule 14a-8(b)); and it sets forth five exceptions to the general rule of inclusion. Rule 14a-8(c). If, as in this case, management does invoke the exceptions, it is required by the rule to submit the proposal to the Commission at least 20 days before submitting its preliminary proxy materials; and, pertinently, management must then furnish both the Commission and the stockholder with its statement of reasons including an opinion of counsel on issues of law. Rule 14a-8(d).

The Commission's regulations designate the Division of Corporation Finance as responsible for passing upon

proxy problems in the first instance. 17 C.F.R. § 200.18 (1971). The Commission itself concedes that, in stockholder proposal disputes, "there are two interested private parties: the management and the shareholder" (A. 60), and the burden of proof is upon management to establish that an exclusion applies. See p. 19, *supra*. As a matter of settled practice the views of both private parties are considered by the agency (A. 60), and the Commission exercises a discretionary review of its staff's determination. See p. 6, *supra*.

In sum, the Commission—operating within the framework of detailed "formal procedures" supplemented by settled practices—compels the company to submit stockholder-proposal disputes to the Commission, treats them as adversary controversies, and resolves them by applying explicit legal standards. The Commission itself admits that an evidentiary hearing is not needed in order to have a "proceeding" under Section 25(a), and the authorities compel that concession. *E.g., Phillips Petroleum Co.* v. *FPC,* 227 F.2d 470 (10th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956); *Isbrandtsen* v. *United States,* 211 F.2d 51 (D.C. Cir. 1954). See Jaffe 420. Not surprisingly, the Commission has never specified in any of its briefs in this case exactly which formalities, short of an evidentiary hearing, it believes are required for a "proceeding" but were omitted here.

There are, of course, many statutes which explicitly limit review to orders resulting from certain prescribed types of agency proceedings.[23] No such restrictive language appears in Section 25(a) and, ac-

[23] *E.g.*, Social Security Act, § 205(g), 42 U.S.C. § 405(g) (1964); Food, Drug and Cosmetic Act, § 701(f), 21 U.S.C. § 371(f) (1964); Communications Act of 1934, § 402(b), 47 U.S.C. § 402(b) (1964).

cordingly, it is fully appropriate to give "proceeding" its plain meaning as a "comprehensive term." *Rice* v. *United States,* 356 F.2d 709, 712 (8th Cir. 1966). When the mere acceptance of a gas rate schedule for filing by the FPC constitutes a "proceeding" under the analogous review provision of the Natural Gas Act (Section 19(b), 15 U.S.C. § 717r(b) (1964)), there is no warrant whatever for withholding that designation from the SEC's procedures in this case. See *Cities Service Gas Co.* v. *FPC,* 255 F.2d 860 (10th Cir. 1958).

A second precondition of judicial review under Section 25(a) is that the proceeding give rise to an "order." The APA, which is to be read *in pari materia* with existing review statutes,[24] sweepingly defines an order as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . ." Section 2(d), 5 U.S.C. § 551(6) (Supp. V, 1970). Plainly the Commission's action in this case represents a "final disposition" so far as the administrative process is concerned, so that judicial review is in no way a premature intrusion into an on-going agency proceeding.

It is well settled that the "particular label" placed by an agency upon its action does not control the question whether there is a reviewable order but rather "it is the substance" which is decisive. *CBS* v. *United States,* 316 U.S. 407, 416 (1942). See also *Phillips* v. *SEC,* 388 F.2d 964, 968 (2d Cir. 1966); 3 Loss 1927.

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[24] *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1970); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971); *In re Engineers Public Serv. Co.,* 221 F.2d 708, 712 (3d Cir. 1955) (SEC proceeding). The Commission's brief itself several times invokes the APA and its legislative history on the reviewability question. *E.g.,* Br. 37, 41.

As shown below (pp. 32, 49, *infra*), the "substance" of the Commission's action here was a legal determination having a substantial adverse impact on the Medical Committee's protected interests. So far as the notion of an "order" may imply some minimum "formal characteristics" (Jaffe 419), those formalities are amply supplied by the Commission's written determination in this case and by the rules and practices which led up to it.

Red Lion Broadcasting Co. v. *FCC,* 395 U.S. 367 (1970), lays to rest any argument that the Commission's action here is not an "order" for purposes of judicial review. In *Red Lion,* this Court held that an FCC letter applying the fairness doctrine to a specific broadcast was a reviewable "order," noting that the FCC "could have" resolved the same issue in a license revocation proceeding or by formal declaratory order under the APA. 395 U.S. at 372-73. The SEC's authority to consider whether Rule 14a-8 applies to a specific stockholder proposal is no less clear,[25]

[25] The SEC could, for example, determine the same issue here presented by order in a proceeding to delist a security (*e.g., Bellanca Corp.,* 38 S.E.C. 405 (1958)); and by the same token it is empowered to issue declaratory orders under the APA. *E.g., In re Pacific Northwest Power Co.,* 41 S.E.C. 863 (1964). Since the SEC can thus issue orders of several kinds determining the applicability of Rule 14a-8, it is merely a play on words for the Commission to suggest that its determination in this case cannot be an "order" because the Commission has no power under Section 14(a) to issue mandatory orders directing companies to comply with the proxy rules. See A. 62-63; SEC Br. 14-15. Whether or not the Commission has power to issue such mandatory orders, it is clearly entitled to make other kinds of orders implicitly or explicitly applying those rules to the facts at hand, and its determination in this instance represents just such an order. Note, "The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835, 859 (1971).

and its determination here is reviewable as in *Red Lion* whether or not it resolved the dispute "with all of the formalities for an adjudicative proceeding . . . ." *Id.*

As the APA and numerous decisions of this Court make clear, it is no objection to reviewability that the Commission's determination here was embodied in a refusal to act rather than an affirmative grant of relief. See Section 2(d) of the APA, 5 U.S.C. § 551(6) (Supp. V, 1970); *City of Chicago* v. *United States,* 396 U.S. 162, 166 (1970); *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 142-43 (1939). Whatever abstract categories may long ago have circumscribed reviewable orders, the test for many years has been a pragmatic one looking to the substance and impact of the determination rather than its form or its strictly "legal" effect. *Frozen Food Express* v. *United States,* 351 U.S. 40, 44 (1956); *CBS* v. *United States,* 316 U.S. 407 (1942).

The Commission's attempt here to resuscitate abstract categories as the test of a reviewable order, by an extensive quotation from *United States* v. *Los Angeles R.R.,* 273 U.S. 299 (1927), thus has "the hollow ring of another era." *Marine Terminal* v. *Raederi. Transatlantic,* 400 U.S. 62, 71 (1970). While the decision in *Los Angeles R.R.* was unquestionably sound on its facts—indeed, "it would be difficult to find in the books an occasion for judicial review more inappropriate and futile" than existed there (Jaffe 399)—it is highly doubtful that Mr. Justice Brandeis ever intended his language quoted by the Commission (Br. 30) to be a "complete formulary" for reviewable orders, even under the restrictive standards of the day. Jaffe 400.

If the language in *Los Angeles R.R.* were now taken as an exhaustive definition, it could not be squared

with later decisions such as *Frozen Food Express, CBS,* and *Red Lion.* See *Phillips* v. *SEC,* 388 F.2d 964, 969 (2d Cir. 1966). Abstract restrictions are especially unjustified in this case since Section 25(a) does not qualify or limit the kinds of orders subject to review. In the last analysis, as Professor Jaffe has said, "absent a clear intention to exclude review, an action which finally denies all [administrative] relief should be considered as a statutory 'order' . . . ." Jaffe 358-59.

A third requirement under Section 25(a) is that the person seeking review of an SEC order be "aggrieved," a condition often discussed in the idiom of standing. A series of decisions of this Court, culminating recently in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), show that aggrievement requires nothing other than an adverse impact on protected interests of the complaining party. The impact which will suffice is not narrowly defined (397 U.S. at 153-54; 397 U.S. at 164) and certainly does not demand an agency determination which forecloses every other legal remedy for litigating the issue in question. *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

The rights asserted by the Medical Committee, in seeking to secure inclusion of its proxy proposal, are "clearly within the zone of interests protected" by Section 14(a) of the Act and Rule 14a-8. *Barlow* v. *Collins,* 397 U.S. 159, 164 (1970). Leading decisions of this Court, confirming that Section 14(a) creates "private" rights, debar any contrary argument.[26]

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[26] *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). *Borak* emphasized that the language of Section 14(a) itself showed its design to provide for "the protection of investors." 377 U.S. at 432.

Indeed, the legislative history of Section 14(a) makes clear the aim of Congress to protect the very right of "fair corporate suffrage" (H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934)) which the Medical Committee asserts in this proceeding. Compare *CBS* v. *United States,* 316 U.S. 407 (1942).

Measured "in a pragmatic way," *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 149 (1967), the adverse impact of the Commission's determination upon those protected interests of the Medical Committee is immediately apparent. If the Commission had determined that Rule 14a-8 did require inclusion of the proposal, there is little doubt that Dow would promptly have complied, thus vindicating the Medical Committee's interests in full without the burden and hazard of litigation. See p. 7, *supra.* Similarly if Dow had resisted, the Commission could readily itself have compelled compliance by seeking an injunction or by other means, and the Commission's action here has thus deprived the Medical Committee of "the potential benefit of the Commission's resources and expertise . . ." (A. 57).

Quite apart from what a correct determination by the Commission might have done to advance affirmatively the Medical Committee's protected interests, the determination it did make would have had a substantial harmful effect on those interests if the Medical Committee had sought relief in a District Court injunction action against Dow. Despite the Commission's disclaimers, the district courts give significant weight to the Commission's adverse actions in such situations, and on top of the other burdens the Medical Committee would carry in such a suit, that of rebutting the Commission's adverse determination could well be insupportable. See pp. 46-50, *infra.*

The fourth requirement for judicial review under Section 25(a) is that the petitioner have been a "party" to the proceeding in the Commission. Without ever squarely asserting that the Medical Committee was not a "party," the Commission's brief surprisingly seeks to create the general impression that proposing stockholders are merely casual bystanders proffering free advice to the Commission (Br. 32). Yet examination of Rule 14a-8 and the actual events in this case readily show that, assuming the course of events at the Commission level was a "proceeding," then assuredly the Medical Committee was as much a party to it as Dow itself.

It was the Medical Committee which invoked Rule 14a-8 by submitting its proposal to Dow, and that same rule required Dow to submit that proposal to the Commission when it and the Medical Committee disagreed. While the Commission says blandly that the stockholder "is not a participant in the [agency] review process" (Br. 32), the Medical Committee filed several written submissions with the staff, sought review by the full Commission, and submitted legal arguments at that level as well. At each stage, the staff and the Commission kept the Medical Committee informed of their actions just as they did Dow.[27]

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[27] In a companion assertion (Br. 32), the Commission states that the proxy rules are "directed only to the Company"; but in fact the stockholder proposal rule is in various respects "directed" to the proposing stockholder (*e.g.*, the 60-day submission requirement of Rule 14a-8(a)), and, in any event, parties to administrative proceedings are as often as not seeking to have the agency apply rules directed exclusively to someone else. As for the arid claim that the stockholder has neither a "right" nor "duty" to speak in the Commission proceeding (Br. 32), it is enough that he does and should speak and that the Commission does and should listen.

It is, in fact, common practice to describe the stockholder and management equally as parties to the Commission proceeding. Thus, in the context of Rule 14a-8, "two distinct parties compete for a favorable agency determination of conflicting interests . . . ." Note, "The SEC and 'No-Action' Decisions Under Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835, 839 (1971). Even the Commission's own brief in the court below described the stockholder proposal dispute as a genre which involves "two interested private parties." *Id.* No language whatever in the Act or in any applicable SEC rule withholds "party" status from the Medical Committee here.

Thus, whether tested by the actual facts in this case or by common usage, the Medical Committee was a party to the proceeding. The predominant interests which Section 14(a) and the proxy rules seek to protect are stockholder interests. Most important, as already shown, since the proposing stockholder's role is central to the structure and operation of the proceeding, he is a "party" to it by the pragmatic standard which measures the meaning of review statutes in this Court. See *Lewis* v. *Labor Board,* 357 U.S. 10, 15-16 (1958).

B. Congressional Intent Is Consistent With Direct Review, and the Presumption of Reviewability Applies

Since each of Congress' express prerequisites has been met in this case, a heavy burden shifts to the party opposing reviewability. That party must demonstrate a Congressional intent, adverse to review, submerged in the legislative plan or history, or a controlling line of authority whose gloss constricts the plain language of the statute. Here, Congressional intent and the authorities support judicial review.

In deciding whether administrative action is reviewable, this Court has given great weight to indications that Congress intended to foreclose review under a particular statute, although such indications are not always preclusive. *E.g., Oestereich* v. *Selective Service System Board,* 393 U.S. 233 (1968). Conversely, Congressional silence brings into play the strong presumption, recognized by many decisions, that Congress favored reviewability. This dual canon operates strongly here to reinforce review of the SEC's determination.

Apparently the Commission concedes that nothing in the legislative history of Section 25(a) militates against review of the agency determination in this case; no evidence of Congressional intent to foreclose review has been offered. On the contrary, the hospitably broad language of Section 25(a)—and the contrast with restrictions explicit in other agency statutes p. 27, *supra*)—stresses the open-ended character of the determinations which Congress contemplated might be tested in the courts.

The legislative context here sharply contrasts with the present language and the history of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1964); and the disparity is not only illustrative but refutes the Commission's footnote analogy (Br. 38) between its determination and the largely unreviewable judgment of the NLRB's General Counsel not to prosecute complaints against unfair labor practices. That statute explicitly confers on the NLRB General Counsel "final authority" respecting "investigation of charges and issuance of complaints" (Section 3(d), 29 U.S.C. § 153(d) (1964)), and the legislative history of that

language shows that Congress intended to invest in the General Counsel an "unreviewable power." *E.g.,* 93 Cong. Rec. 6859 (1947) (statement of Senator Taft).[28]

The absence of any Congressional intent to foreclose review in the present case strongly encourages reviewability. As this Court stated in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967)—aptly described as an "over-shadowing case" on review of agency action (Davis 942 (1970 Supp.))—the rule is that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." In the present case, there is no evidence of any Congressional purpose to foreclose review, let alone the "persuasive" evidence which *Abbott* and its successors show to be necessary. See 387 U.S. at 140.

This Court's "presumption" that aggrieved persons may obtain review of administrative decisions, *City of Chicago* v. *United States,* 396 U.S. 162, 164 (1969); *Tooahnippah* v. *Hickel,* 397 U.S. 598, 606 (1970), also represents the understanding of Congress, as the APA

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[28] See Symposium, "Judicial Reviewability of NLRB Rulings," 63 *Nw. U. L. Rev.* 106, 109-10 (1968). This express evidence of Congressional intent to foreclose review is not the only distinguishing characteristic of the statute governing NLRB General Counsel's complaint determinations. See, *e.g., Lincourt* v. *NLRB,* 170 F.2d 306, 307 (1st Cir. 1948) (emphasizing that only "Board" orders are reviewable). In the era when the law concerning review of refusals to file unfair labor practice complaints hardened into its present statutory mold, there were still other obstacles to such review. *Compare Amalgamated Utility Workers* v. *Consolidated Edison,* 309 U.S. 261 (1940), *with Auto Workers* v. *Scofield,* 382 U.S. 205 (1965).

and its legislative history confirm.[29] Even more specifically, there is every reason to conclude that the very objectives that Congress sought to achieve when it enacted Section 14(a) will be fostered by reviewability of the Commission's stockholder determinations. See pp. 56-59, *infra*. Thus the overriding Congressional "purpose" that its statutes be construed to achieve legislative goals adds further affirmative support for review here. *E.g., NBC* v. *United States,* 319 U.S. 190 (1943).

C. Precedent Does Not Support the Commission's "Gloss" on Section 25(a)

Despite the evidence of Congressional intent and the presumption of reviewability, the Commission seeks to impart a limiting gloss to Section 25(a) based on allegedly applicable precedent. Relying centrally on *FPC* v. *Metropolitan Edison Co.,* 304 U.S. 375 (1938), the Commission contends that Section 25(a) embraces only "orders of a definitive character dealing with the merits" (304 U.S. at 384), and it asserts that this language precludes review in the present case. See Br. 22-24, 29.

As the Commission must be taken to have dealt "with the merits" of Rule 14a-8's application to the

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[29] See Section 10(a) of the APA, 5 U.S.C. § 702(a) (Supp. V, 1970). A relevant passage of the House Report dealing with judicial review, quoted in part in *Abbott,* states: "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified . . . . To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of intent to withhold it." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946). See S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Medical Committee's proposal (see pp. 17-21, *supra*), the weight of the Commission's argument hangs in the first instance upon the meaning given to the word "definitive." In the context of the *Metropolitan Edison* opinion that word was used to signify only that the administrative proceeding must be complete before judicial review can be sought. That decision rebuffed attempts to obtain review of an interlocutory "procedural" order (304 U.S. at 783) made in the course of a *still-continuing* administrative investigation, and the Court's expressed purpose was to avoid the "constant delays in the course of the administrative proceeding" which would attend the review of "mere procedural requirements or interlocutory directions . . . ." 304 U.S. at 384.[30]

Moreover, later decisions make clear that an order need not be "definitive" to be reviewable if, as the Commission suggests, that term is taken to mean a determination conclusively binding on all parties under strict *res judicata* principles. In *Abbott* itself, for example, the parties seeking review of an order prescribing regulations were entirely free to contest the legality

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[30] The Commission's attempt to convert a phrase used once in a 30-year-old opinion into a talisman for reviewability is additionally unsound because of the curious linguistic surgery it requires. The phrase relied upon occurs in a single sentence of *Metropolitan Edison*, stating that "the provision for review thus relates to orders of a definitive character dealing with the merits of the proceeding before the Commission and resulting from a hearing upon evidence supported by findings appropriate to the case." 304 U.S. at 384. The Commission itself admits that the last half of the sentence, if read as a blanket restriction, is no longer the law (see Br. 29; p. 27, *supra*); surely the author of the opinion cannot have conceived that his sentence would be scissored apart as the Commission seeks to do.

of the FDA's interpretative regulations if and when the FDA sought to enforce them. 387 U.S. at 136. See also *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *Lester C. Newton Trucking Co.* v. *United States,* 209 F. Supp. 600 (D. Del. 1962), *aff'd per curiam,* 374 U.S. 702 (1963).

Although an order need not be irrevocably binding to be subject to review, the Commission's determination in this case *can* fairly be described as "definitive," so far as the Commission is concerned, on any realistic appraisal. While the Commission's brief asserts that "the Commission itself was not bound by that determination" and "could still bring suit against Dow" to enforce the proxy rules (Br. 30), the assertion so far as it relates to the Medical Committee's proposal requires qualification so severe as to render it inconsequent.

The supporting authorities cited by the Commission (Br. 30)—stating that the Government is not "estopped" by its agents—have in recent years usually involved cases where the federal agent's representation was induced by falsity or concealment of facts. *E.g., SEC* v. *Culpepper,* 270 F.2d 241 (2d Cir. 1959). As the law is evolving, it is by no means clear that the Commission could bring suit against Dow in the teeth of its own outstanding legal determination where, as here, there was no misrepresentation or concealment by Dow. See, *e.g., Moser* v. *United States,* 341 U.S. 41 (1950); Davis 588-90 (1970 Supp.). Be that as it may, "the reality is . . . the Commission does not depart from what is held out in a no-action letter" (*id.* at 206), as its own statements squarely confirm. See 3 Loss 1844.

The Commission finally argues that nonreviewability in this instance is supported by a consistent line of lower court decisions and the views of recognized commentators (Br. 37-38). The fact is, however, that not a single one of the cited decisions held that direct review was unavailable where a Commission determination applied Rule 14a-8 to a stockholder proposal.[31] One of the very commentators cited by the Commission recently observed that "so far as it appears no one has ever sought judicial review of a no-action letter issued by the Commission." Davis 206 (1970 Supp.).

Of the nine cases cited by the Commission only one —an unreported per curiam opinion in *Peck* v. *SEC*, No. 22,289 (2d Cir., April 7, 1952)—even involved a stockholder proposal under Rule 14a-8. There the Commission determined that a proposal directed against segregated bussing need not be included in the Greyhound Corporation's proxy statement, and the stockholder sought judicial review not of the merits of this ruling but, as the Commission accurately reported at the time, of its denial of a "request for an oral hearing" on the matter. 18 SEC Ann. Rep. 75 (1952). Among other contentions, the Commission argued in *Peck* (Resp. Mem. 15-16) that it was free to resolve

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[31] The cases cited do not even sustain the Commission's less ambitious claim that there is a governing distinction between "formal" statutory proceedings which are reviewable and "informal or advisory action" which is not (Br. 37). *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1970), itself demonstrates that the formalities are not controlling; actually, informal action taken without full procedural safeguards may sometimes call for review more urgently than formal action. 4 Davis 113. Moreover, as the court of appeals observed (A. 61), there is no bright dividing line between formal and informal action, and in any case the procedures applied in this case have the most pronounced formal aspect. See pp. 26-27, *supra*.

the issue with or without an oral hearing, and the court of appeals dismissed the appeal without opinion.

As for the commentators who are said to have "generally recognized" nonreviewability (Br. 38), the two principal authorities cited by the Commission—Professors Davis and Loss—do not appear to support its views in any discernibly direct way. The other two writers cited do assume direct review of Rule 14a-8 determinations to be unavailable but without detailed analysis and certainly without any hint of approval; quite the contrary, the Commission's own brief shows one of them to be an avid proponent of review (Br. 38) and the other is a fierce critic of the SEC's administration of Rule 14a-8. See p. 58, *infra*. More to the point, the decision of the court below, made in the context of this Court's recent decisions on reviewability, has already received substantial and reasoned approval from commentators today.[32]

The cramped reading of Section 25(a) urged by the Commission is, finally, not consistent with the expansive approach taken by this Court in *J.I. Case* v. *Borak*, 377 U.S. 426 (1964). There this Court read broadly other remedial provisions of the Act, including Section 27, 15 U.S.C. § 78aa (1964), to sanction private damage actions for violation of the proxy rules. Surely if federal causes of action may be *implied* to vindicate stockholders' rights under the Act, there is no basis

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[32] See Note, "The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835 (1971); Note, "Medical Committee for Human Rights v. SEC: Judicial Review of SEC No-Action Determinations Under the Proxy Rules," 57 *U. Va. L. Rev.* 331 (1971); Case Comment, 45 *N.Y.U.L. Rev.* 1098 (1970); Recent Case, 24 *Vand. L. Rev.* 387 (1971); Recent Decision, 20 *American U. L. Rev.* 190 (1970).

for curtailing the express protection which Section 25(a) affords to the same rights of stockholders by assuring them direct judicial review.[33]

III. THE COURT OF APPEALS IS THE MOST APPROPRIATE FORUM FOR REVIEW OF THE COMMISSION'S LEGAL DETERMINATION, AND AN INJUNCTION SUIT IN THE DISTRICT COURT DOES NOT AFFORD STOCKHOLDERS AN ADEQUATE REMEDY.

A. The Court of Appeals Is the Most Appropriate Forum

The lower court here concluded that, judged "by every substantial consideration," direct review of the Commission determination in the court of appeals was a more appropriate method of review than an indirect attack, made in the Commission's absence, through an injunctive suit against management in the district court (A. 64). This consideration is properly relevant where a court is construing a statute "governing the distribution of judicial responsibility," *Swift & Co.* v. *Wickham*, 382 U.S. 111, 124 (1965), and the lower court's appraisal is accurate.

The substantive issue posed in the court of appeals in this case, as in the normal dispute under Rule 14a-8, was a legal one involving the correctness of the Commission's interpretation of an agency regulation having the force of law. Had the Commission made an identical interpretation, in a proceeding to delist Dow for violation of Rule 14a-8 or through a formal declaratory

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[33] *Borak* is not the only decision affirming that the securities laws deserve a broad construction. *E.g.*, *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *SEC* v. *Capital Gains Bureau*, 375 U.S. 180, 195 (1963). In the latter case, this Court stated that securities legislation should be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes."

order in a full-fledged adjudicative proceeding, the same issue could unquestionably have been brought directly to the court of appeals under Section 25(a). As Professor Jaffe has said, "Presumptively the forum appropriate for review of the usual order is equally appropriate for other agency orders." Jaffe 358.

Under Section 25(a), it was patently Congress' intent that Commission determinations be reviewed in the courts of appeals. See S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934). A comparable view was taken by the Congress when in the Judicial Review Act of 1950, 28 U.S.C. § 2341-52 (Supp. V, 1970), it provided uniform review in the court of appeals for orders of several different departments and agencies. The House Report there stated that review of agency determinations in the courts of appeals rather than in the district courts "is the more modern method and is generally considered to be the best method for the review of orders of administrative agencies." H. R. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950).

The courts of appeals are fully experienced in resolving legal issues attending agency action and inevitably provide a swifter, more efficient and less expensive forum for such review. These considerations would not be irrelevant if merely the litigants' private interests were at stake (see Fed. R. Civ. P. 1); but in Rule 14a-8 controversies the availability of court of appeals relief may well be the difference between sustaining stockholder rights under the rule or their abandonment. After the Commission has acted on a stockholder proposal dispute, only a few weeks or even days usually remain before management must print

and distribute its proxy material.[34] If at that stage the stockholder must begin an independent action in the district court, it is almost impossible for him to obtain timely relief in the face of the Commission's adverse determination and other practical and legal barriers. See pp. 46-50, *infra*.

When these realities are understood, there is a certain irony in the Commission's argument that the district court is a more appropriate forum because only there can a stockholder obtain mandatory relief against management (Br. 44). In practice management almost always accepts the determination of the Commission, and such mandatory relief is totally unnecessary. See p. 7, *supra*. It is noteworthy that as soon as the court of appeals expressed its view that the Medical Committee's proposal was not excludible under Rule 14a-8, Dow voluntarily included the proposal in its next proxy statement even though the court had merely remanded the case to the Commission for further explanation of the agency's views.

The experience of recent years is fair evidence that requiring resort to the district court injunction suit, described by the Commission as affording full relief (Br. 42-44), is likely to result in the stockholder's abandoning the matter and obtaining no relief at all. It can hardly be accidental that, while almost 900 stock-

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[34] Due to the interrelationship of the timing provisions of the proxy rules, management is not required to decide whether it will include or exclude a stockholder's proposal until approximately four weeks before it intends to distribute its proxy statement. Rules 14a-6(a), 14a-8(d). It is not until that point that the management must submit the matter to the Commission's staff. In this case the Commission itself did not enter its minute until several days after Dow planned to distribute its proxy materials (A. 22, 44).

holder proposals were rejected in a 15-year period ending in 1969, only three district court actions appear even to have been attempted.[35] In none was the stockholder successful.

If there are rare cases where efficiency will be served by an injunction suit in the district court rather than direct review in the court of appeals, then the stockholder himself has every reason to pursue that route.[36] In the usual case, where direct review would be sought by the stockholder, a prudent management which was irrevocably opposed to including the stockholder proposal would intervene in the court of appeals proceeding and contest the issue there. See Fed. R. App. P. 15(d). The argument made by the Commission is, in substance, little different than that which was made by it and rejected many years ago in *American Sumatra Tobacco Corp.* v. *SEC*, 93 F.2d 236, 241 (D.C. Cir. 1937), where the court said:

> "The alternatives [to direct review] suggested by the Commission, that petitioners may seek relief outside the Act by a suit in equity for an in-

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[35] See 22-35 SEC Ann. Reps. (1956-1969). Those cases are *Brooks* v. *Standard Oil Co.*, 308 F. Supp. 810 (S.D.N.Y. 1969); *Curtin* v. *AT&T*, 124 F. Supp. 197 (S.D.N.Y. 1954); and *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

[36] See, *e.g.*, *Mougios* v. *W. R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D.N.Y. 1971). The Commission's discussion (Br. 44 n.42) of the subsequent direct review proceeding now pending in the Second Circuit, *Mougios* v. *SEC*, No. 71-1438, implies that an ultimate court of appeals determination that the Mougios proposal was wrongfully omitted would have to be followed by further district court litigation to compel Grace to include the proposal in the next proxy statement. Given the court of appeals determination, the likelihood that such follow-up litigation would be needed is, of course, highly remote.

> junction . . . would result in equal inconveniences and would constitute circuitous routes for the determination of issues easily and directly determinable by review in this court."

B. The District Court Injunction Suit Is Not an Adequate Remedy

As already noted, time is usually short when management first determines to reject a stockholder proposal and is even shorter when the staff and the Commission have made their own determination. See p. 44, *supra*. Apparently the Commission believes that the stockholder is not aggrieved by its determination nor denied an adequate remedy since at this late stage, after having made a full submission to the staff and Commission, the stockholder can theoretically bring an independent action in the district court against the company's management. The realities tell a different story.

As a preliminary matter, the stockholder would have to bring his original action in the district where the company may be found or transacts business (Section 27 of the Act, 15 U.S.C. § 78aa (1964)) rather than in the circuit where the stockholder himself resides or in the District of Columbia circuit, as Section 25(a) provides. Then, he would have to persuade the district judge to dispense with pretrial discovery and, on a summary basis, issue an injunction that would irrevocably resolve the controversy. These measures are not encouraged by the appellate courts, and the alternative of postponing the company's annual meeting *pendente lite* is still less likely to appeal to the district judge. *E.g., Mougios* v. *W.R. Grace & Co.*, CCH Fed. Sec. L. Rep. ¶ 93,038 (S.D.N.Y. 1971).

On the merits, in the district court the stockholder may be faced with demands that he establish not only a violation of Rule 14a-8 but irreparable injury and other requisites often required for injunctive relief (*e.g., Curtin* v. *AT&T*, 124 F. Supp. 197, 198 (S.D.N.Y. 1954)); in a statutory review proceeding in the court of appeals, only the violation need be shown. Jaffe 418. Lastly, the stockholder would have to persuade the district judge, quite possibly inexperienced with SEC practice, to disregard what the judge will frequently and rightly regard as the SEC's expert judgment that the proxy rules will not be infringed by omission of the proposal. See, *e.g., Brooks* v. *Standard Oil*, 308 F. Supp. 810, 813 (S.D.N.Y. 1969).

Contending that the exhaustion of remedies doctrine does not apply when the agency cannot grant "full relief," the Commission's brief argues that the stockholder need not await its determination before seeking an injunction (Br. 33). Yet as a practical matter the Commission can afford the stockholder full relief in most cases (see p. 7, *supra*), and the courts apply the exhaustion doctrine not by generalities but on a case to case basis.[37] Even a complete exemption from the doctrine would do little to relieve the time pressure or facilitate district court relief. Courts would rarely find a justiciable controversy until management actually rejected the proposal, and some judges would

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[37] See 3 Davis 97-100. The principal decision relied upon by the Commission, notably *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944), involved fact situations in which the possibility of any relief, let alone full relief, was so remote that comparison with the present facts is unthinkable. The only decision squarely in point involving a stockholder proposal under Rule 14a-8 did, of course, require that the stockholder exhaust his agency remedy. *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

refuse to act until a decision had been made by the Commission staff under Rule 14a-8(d).

Whether or not the exhaustion doctrine applies *ex proprio vigore,* the Commission's suggestion that its processes be sidestepped is highly perplexing. A stockholder proposal dispute submitted to the Commission may be resolved at the agency level, sparing both party and courts the time and expense of litigation. Sometimes, indeed, the Commission effects intermediate solutions which neither side has advanced.[38] In short, a court would properly look askance at a stockholder who accepted the Commission's present suggestion and brought a district court suit "without even complaining to or consulting the Commission" (Br. 32-33).

It is equally an oversimplification for the Commission to assert that the district courts are "at least as qualified" as the Commission to pass on such controversies in the first instance (Br. 42-43) and that the courts should not accord "any weight" to proxy rule determinations such as it made here (Br. 34-35). An agency's interpretive judgment on any issue does not automatically require or forbid the deference of a reviewing court according to blanket rule. Instead,

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[38] The staff may respond to a disputed proposal by informing both parties that it views the proposal as includible under Rule 14a-8 if, but only if, certain modifications are made to take the proposal outside of specified exclusions. The Commission made such a determination in March 1970 with respect to proposals submitted for the General Motors Corporation proxy statement, and the stockholder accepted the limitations and eschewed litigation. See Schwartz, "The Public Interest Proxy Contest: Reflections on Campaign GM," 69 *Mich. L. Rev.* 419, 451-54 (1971). The Commission staff made a similar determination in April 1971 in connection with proposals submitted to Fidelity Fund, Inc. BNA Sec. Reg. & Law Rep., May 12, 1971, p. K-1.

the weight given an agency determination turns on the particular circumstances, including the care given to it by the agency, the reasoning, its consistency with other agency pronouncements and "all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Naturally no weight should be given in a subsequent proxy fraud suit to the Commission's mere inaction on a proxy statement where facts were not disclosed to it. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432-33 (1964). It does not follow, however, that the Commission's views deserve no weight where a deliberate judgment was made on known facts, and the lower courts, with varying degrees of qualification, have given weight to those views in numerous cases.[39] Because Rule 14a-8's formal procedures channel disputes and bring them to the Commission's attention, the courts are especially likely to give weight to Commission action on them, absent a clear showing of error such as a conflict with past rulings or a departure from legislative purpose.

De novo review of stockholder proposal disputes by the district courts is not made either more likely or more appropriate by the Commission's assertion that

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[39] *E.g.*, *Brooks* v. *Standard Oil Co.*, 308 F. Supp. 810 (S.D.N.Y. 1969) (Rule 14a-8); *Union Pacific R.R.* v. *Chicago & N.W. Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964) (Rule 14a-9); *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951) (Rule 14a-8); *Leighton* v. *One William Street Fund, Inc.*, CCH Fed. Sec. L. Rep. ¶ 91,561 (S.D.N.Y. 1965) (Rule 14a-9). See Aranow & Einhorn, *Proxy Contests for Corporate Control* 467 (1968); Loss, "The SEC Proxy Rules in the Courts," 73 *Harv. L. Rev.* 1041, 1065 (1960). As the court said in the *Leighton* case (at p. 95, 122), which the Commission itself cites on this issue (Br. 34), a proxy rule interpretation by the Commission is entitled to "great deference" but is not conclusive upon the court.

"questions of state law" are "frequently critical" under Rule 14a-8 (Br. 43). The familiar truth is that precedents on state law, nominally relevant to the "proper subject" exclusion, are "generally nonexistent" so that the Commission has long "been building up a 'common law' of its own" to resolve such questions. 2 Loss 906.[40] Indeed, since the Commission has generally failed to disclose its determinations under Rule 14a-8, the benefits of its accumulated experience can be had only by initial resort to the Commission.

It is therefore clear that stockholder proposals normally ought to be taken to the Commission initially and that the courts have and will regard its determinations as carrying weight. Although this barrier to injunctive relief is substantial, the courts of appeals on direct review are themselves likely to give weight to Commission views. The difference is that in the court of appeals the Commission will be a party, will generally explain its grounds, and will thus permit the reviewing court to judge its position on its merits; but the district court, where the Commission need not appear, will normally be faced with the unexplained fact of a Commission determination and as experience has shown will rarely be prepared to disregard it on a summary basis.

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[40] The Commission's brief also suggests that factual issues outside the Commission's ken may sometimes be involved in three other exclusions, including the "general cause" exclusion of Rule 14a-8(c)(2). See Br. 43. The Commission has been applying the "general cause" exclusion for some years without intimating that an oral examination inquiring into the stockholder's subjective intent was needed (compare p. 48 n. 38, *supra*), and such an approach would render the rule virtually unworkable. The other two exclusions adverted to as sometimes requiring factual determinations are presumably those of Rules 14a-8(c)(3) and (4); the kinds of "facts" relevant to those rules are reflected in the minutes of the stockholders' meeting and are not likely to be in dispute in the normal case.

Quite apart from the inadequacy of district court relief for the aggrieved stockholder, it should be observed that there is no reason why such a remedy, even if it were far more adequate than it is in fact, should preclude review under Section 25(a). The latter section, after all, is the statutory remedy prescribed by Congress. If statutory prerequisites are satisfied, as they are here, it is not customary to require a litigant to forego direct review in favor of an original action in the district court. *Environmental Defense Fund, Inc.* v. *Hardin,* 428 F. 2d 1093, 1098-99 (D.C. Cir. 1970); *American Sumatra Tobacco Corp.* v. *SEC,* 93 F. 2d 236, 241 (D.C. Cir. 1937).

IV. DIRECT JUDICIAL REVIEW WILL NOT IMPOSE A SIGNIFICANT BURDEN ON THE COMMISSION, AND SUCH REVIEW WILL IMPROVE EXISTING ADMINISTRATION OF RULE 14a-8.

A. No Significant Burden Will Result From Judicial Review

In a final argument against direct judicial review, the Commission frankly invokes considerations of expediency and contends that a heavy burden will be cast upon the agency if such review is allowed (Br. 45-48). As judges have often noted, such predictions of administrative disruption, frequently made in opposing reviewability, "are rarely borne out in practice." *Office of Communication of United Church of Christ* v. *FCC,* 359 F. 2d 994, 1006 (D.C. Cir. 1966). The court below was correct in finding these "grim forebodings" unjustified in this case (A. 69).

By its own terms, the decision below applies only to stockholder proposal disputes, and they constitute a very small segment of the SEC's business, even as a proportion of matters arising under the proxy rules. While the Commission processes over 5,500 proxy statements a year (Br. 47), in its most recent fiscal

year only 35 stockholder proposals were excluded under Rule 14a-8 (36 SEC Ann. Rep. 47 (1970)); in fact, the number of excludible proposals has actually decreased in the past several years. Compare, *e.g.*, 34 SEC Ann. Rep. 42 (1968) (74 proposals excluded). The number of contested proposals found includible is harder to determine but does not appear to be large.[41]

Of the limited number of proposals actually contested in the agency, only a minority of disappointed stockholders are likely to have the interest or resources to seek judicial review, while disappointed managements have even less reason to challenge the Commission's determination. See p. 7, n. 6, *supra*. Therefore, the "burden" that judicial review would cast upon the Commission is essentially that of explaining its determination in court in only a handful of cases a year, and even these are likely to decrease once governing precedents are established by the decisions.[42]

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[41] The two annual reports cited above show, for example, that 241 stockholder proposals submitted by 25 stockholders were included in 1970 and 162 submitted by 34 stockholders were included in 1968. There is no indication how many of these proposals were protested by management; and management's objection, even where made, would often be *pro forma* since it can often muster a large majority of the proxies and vote the proposal down.

[42] The Commission's brief suggests that the court of appeals "contemplates" a "more formal decision-making process" at the agency level (Br. 46), but the lower court explicitly disclaimed any intention to meddle in the Commission's "internal management," and its review was confined to the merits rather than the method of the Commission's determination (A. 68). At most, the Commission may sometimes be called upon to reconsider its determination and reveal its reasons, as the court of appeals did here in the face of an inexplicable result. The burden of this task is not apparent, especially since the staff appears to prepare memoranda on troublesome cases in any event (A. 44).

Where the Commission exercises sound judgment in making its initial determinations, the prospect of litigation is even more slight. If an occasional frivolous appeal is pursued, the burden of defense cannot be heavy, and the appeals courts are well equipped to deal shortly with such claims. It is noteworthy that the SEC has, among agencies, a relatively slight load of court litigation (see 6 Loss 4055) and finds time to appear not infrequently as an *amicus curiae* in private litigation raising significant issues. 3 Loss 1935; 6 Loss 4071-72.

While judicial review will impose no unmanageable burden, it is not amiss to note that the Commission's processes are within its own control and that it is not obliged to rule on stockholder proposals either itself or through its staff.[43] There are certainly good reasons why it should continue to do so, subject to limited review in the courts of appeals. Its present posture, however, gives the stockholder the worst of both worlds: an adverse determination severely hobbles him in the district courts, while the Commission resists review of that determination in the courts of appeals.

In actuality, the thrust of the Commission's burden argument is not that it would be disabled by review limited to stockholder proposals; instead its brief suggests that, by a kind of "domino" theory, direct judicial review would necessarily be extended to the far larger number of no-action letters dealing with stock registration and with proxy matters other than those

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[43] As earlier noted, the question whether staff determinations standing alone would be reviewable is basically academic at present (see p. 17, n. 14, *supra*), and the Commission in all events controls its staff. There is, however, little to the Commission's intimation (Br. 47) that a line between Commission and staff action could not be drawn, if a court chose to do so. See A. 69.

arising under Rule 14a-8. However, these determinations are not fungible with those made under Rule 14a-8, but differ both in substance and procedure. Given reviewability of stockholder proposal determinations, it is safe to predict that the Commission will not be long in advancing the very plausible distinctions between the different categories.

The largest of the categories, apparently embracing about three-quarters of the 5,000 or so no-action letters issued annually by the SEC, represents staff or Commission determinations as to whether a stockholder or company may sell stock without registration.[44] By contrast to Rule 14a-8 determinations, there is no requirement that the selling stockholder submit the matter to the Commission. There is rarely an adversary interest. The staff acts by applying broad-gauge uncodified standards to a particular set of alleged facts. See p. 54, n. 44, *supra*. In sum, the method and substance of decision bear little resemblance to the typically adversary determination under Rule 14a-8, governed by detailed procedures and made pursuant to codified regulatory standards readily amenable to judicial review.

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[44] See W. Lockhart, *Report on Study of No-Action Letters and Related Advisory Processes, Administered by the Division of Corporation Finance, Securities and Exchange Commission* 1-3 (undated report prepared for U.S. Administrative Conference). The registration in question is that required by the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1964), which forbids sales of stock not registered with the Commission, subject to a series of exemptions. Most of the no-action letters on this issue involve the so-called "underwriter" exemption which the Commission applies to the facts of each case through a number of inchoate criteria such as "investment intent" and "change of circumstances." See F. Wheat, *Disclosure to Investors* 160-78 (1969) (prepared for the SEC by Commissioner Wheat).

No-action letters concerning issues arising under other proxy rules, such as Rule 14a-9 which forbids false and misleading statements, are similarly distinguishable. Again, the matter is likely to turn on a complex of unique facts which are, as the Commission suggests, themselves merely assumed *arguendo* (Br. 22-23). In these cases, also, the adversary interest is normally absent. When such an interest is present, as in proxy contests, the Commission may decline to intervene "as a matter of policy" absent the most serious abuse. *1956 Hearings* 1552 (testimony of Chairman Armstrong).[45]

In seeking to elide these distinctions between stockholder proposal determinations and other no-action letters the Commission is in substance asking the Court to decide one case on the facts of another. However such "opening wedge" arguments may be phrased, review of stockholder proposal determinations neither implies nor compels review of other types of Commission action taken pursuant to different procedures, and judges are entirely competent to draw the necessary lines. *Compare,* for example, *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), *with Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158 (1967).

In *Abbott* itself, the Food and Drug Administration resisted direct judicial review by making essentially the same "burden" arguments urged here by the Commission. The FDA's brief devoted several pages

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[45] As Chairman Armstrong explained, both sides in proxy contests are normally able to reply in kind or seek legal redress on their own. The Commission does not like to inject itself into election contests, and it is unwilling to take steps which, by postponing an election, may actually disenfranchise stockholders. *Id.* 1551-52.

to minatory predictions concerning the "very heavy burden on the agency" that would result from judicial review and the prospect that review would "seriously impair the effectiveness of the statute." Resp. Br. 32-34. This Court responded that courts are well equipped to confine judicial review within manageable bounds (387 U.S. at 154-55), and of course the collapse of the FDA has not materialized.

B. Judicial Review Will Improve Administration of Rule 14a-8

The benefits of direct judicial review of stockholder proposal determinations are at once more numerous and more concrete than any inconveniences which review might work upon the Commission. If broad prudential considerations are relevant even where statutory prerequisites have been met, as the Commission here supposes, those considerations argue strongly in favor of review in this instance.

Judicial review will, most immediately, assist the proposing stockholder, together with all other stockholders, by assuring that wrongly excluded proposals are restored to the proxy statement and subject to vote at the meeting. Such review will also diminish the risk that the Commission will persist in an erroneous legal interpretation which, in the absence of judicial oversight, might plague proposing stockholders for years. Consequently, direct judicial review serves the very interest in "fair corporate suffrage" at which Congress aimed in enacting Section 14(a) and which this Court sought to protect in *J. I. Case* v. *Borak*, 377 U.S. 426 (1964).

Moreover, stockholder proposals tend to have a "healthy" impact on the corporations themselves.

2 Loss 910. Over the years the proposals have aimed at a wide variety of reforms ranging from now familiar achievements, such as independent auditors and reports to stockholders, through significant structural improvements in mutual fund administration. See Emerson & Latcham, "The SEC Proxy Proposal Rule: The Corporate Gadfly," 19 *U. Chi. L. Rev.* 807 (1952); p. 48, n. 38, *supra*. Proposals rejected at first have often been accepted over time, sometimes by voluntary choice of management.[46]

Moreover, "the very opportunity to submit proposals . . . affords a safety valve for stockholder expression" at a relatively slight price. 2 Loss 910. The values of free expression thus implicit in effective operation of Rule 14a-8 have been recognized by the courts in other circumstances, and reinforced by judicial review, even when those values are ultimately implemented through the action of private enterprises. *Cf. Public Util. Comm'n* v. *Pollak,* 343 U.S. 451, 462 (1952); *Banzhaf* v. *FCC,* 405 F. 2d 1082, 1101 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

There is, lastly, another beneficiary of judicial review, and that is the agency itself. It is natural that officials called upon to explain agency action in court should describe judicial review as a burden. Yet, when

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[46] Two of the proposals at issue in the original *Transamerica* litigation were eventually adopted by management without ever being submitted to a stockholder vote. See 14 SEC Ann. Rep. 54 (1948). More recently, General Motors Corporation after two stockholder proposals had been defeated at its annual meeting adopted on its own initiative other reforms looking in the same general direction. See Note, "Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals," 80 *Yale L.J.* 845, 850 (1971).

properly confined by due respect for agency judgment and comparable limitations on the scope of review, judicial review so limited "does not weaken the administrative process but strengthens it," because the courts have their own skills to contribute "to accomplishment of administrative objectives." 4 Davis 112-13.

As the lower court here intimated, the Commission itself may possibly profit from judicial guidance in its own administration of Rule 14a-8. The Commission is doubtless correct in asserting that its proxy rule methods have in general been highly commended by the commentators (Br. 12). Yet it has also been suggested that the SEC's administration of Rule 14a-8 has not been as effective as it might be, either in administrative process or the substance of decisions.

The most detailed study available of the Commission's actual administration of the stockholder proposal rule was made by a former attorney-advisor in the Division of Corporation Finance, who was familiar with and referred in his study to many of the decisions made by the staff and the Commission. Clusserath, "The Amended Stockholder Proposal Rule: A Decade Later," 40 *Notre Dame Lawyer* 13 (1964). His lengthy analysis, adverted to by the lower court (A. 67), leveled numerous criticisms at the SEC's handling of Rule 14a-8 determinations, including "inconsistent administration," "poor substantive law," and "failure fully to inform outsiders" of its prior determinations. *Id.* at 39-42. See also 5 Loss 2860.

On a substantive plane, there has been counterpart criticism of the increasing number of exclusions introduced into the stockholder proposal rule and their in-

terpretation by the Commission.[47] Whatever the merits of these criticisms, certainly the views of the courts on questions of law and on the Congressional purpose underlying Section 14(a) can only serve to improve the agency's own effectuation of the rule. In fact, since the lower court's decision, the SEC has undertaken to "reconsider" its substantive rules relating to stockholder proposals (statement of Chairman Budge, BNA Sec. Reg. & Law Rep., Nov. 11, 1970, p. A-3), and only direct court of appeals review is likely to produce such results. Note, "The SEC and 'No-Action' Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review," 84 *Harv. L. Rev.* 835, 856 (1971).

To recognize that direct judicial review of Commission determinations under Rule 14a-8 is not likely to be frequent, so long as the agency exercises sound judgment, in no way detracts from the benefits of review. Availability of review itself encourages care by the agency, and a single court of appeals' decision may provide guidance that will enable the Commission's staff to dispose properly of countless cases that follow

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[47] See Bayne, Caplan, Emerson Latcham, "Proxy Regulation and the Rule-Making Process: The 1954 Amendments," 40 *Va. L. Rev.* 387 (1954); Note, "Proxy Rule 14a-8: Omission of Shareholder Proposals," 84 *Harv. L. Rev.* 700 (1971). Starting with the initial codified rule in 1942, allowing proposals on any "proper subject" for stockholder action (Sec. Ex. Act Rel. No. 3347 (Dec. 18, 1942)), the chronology of major limitations and refinements includes: "the general cause" exclusion first announced in 1945 (Sec. Ex. Act Rel. No. 3638 (Jan. 3, 1945)) and now codified as Rule 14a-8(c)(2); an exclusion for "personal grievances" now included in the same rule, and limitations on previously made proposals which were not acted upon or were defeated, now codified in Rules 14a-8(c)(3) and (4) (Sec. Ex. Act Rel. No. 4185 (Nov. 5, 1948)); an exclusion for recommendations concerning the company's "ordinary business" operations now in Rule 14a-8(c)(5) (Sec. Ex. Act Rel. No. 4979 (Jan. 6, 1954)); and an exclusion for "counter-proposals" to matters submitted by management inserted in Rule 14a-8(a) (Sec. Ex. Act Rel. No. 8206 (Dec. 14, 1967)).

at the administrative level. Such a calibrated interplay of court and agency is one of the prime purposes of judicial review. See *FCC* v. *RCA Communications,* 346 U.S. 86, 91 (1953); *Attorney General's Report* 76-79.

In the last analysis, however, judicial review is called for in this case not because of any one of its benefits, but rather because it conforms to the bedrock principle of our legal system expressed by this Court in *Abbott:* absent a contrary Congressional intent, final agency action which adversely affects protected interests of citizens should be subject to the scrutiny of the courts. "For just in so far as administrative determinations are subject to court review, a means exists for maintaining the supremacy of law, though at one remove and as a sort of secondary line of defense." J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 37 (1927). See L. Fuller, *The Morality of Law* 81 (1963).

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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September 1971

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 30 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1162~~ 70-61

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
COUNTERSTATEMENT	2
A. The Type Of Company-Shareholder Dispute Involved	2
B. The Mandatory Procedures Established By The SEC For The Handling Of Such Disputes	4
C. The Action Taken By The Agency In This Case	6
D. The Relief Sought By The Medical Committee In The Court of Appeals Below	7
E. The Proceedings In The Court Below	9
REASONS FOR DENIAL OF THE WRIT	11
I. SINCE THE PRINCIPLE OF REVIEWABILITY APPLIED BELOW WOULD PROVIDE JUDICIAL REVIEW OF SEC ACTION ONLY IN VERY RARE CIRCUMSTANCES, THE PETITION FOR CERTIORARI HAS SUBSTANTIALLY OVERSTATED THE PRACTICAL IMPLICATIONS OF THE RULING BELOW	11
II. SINCE THE ISSUE OF REVIEWABILITY PRESENTED HERE IS ONE WHICH CAN BE AND WAS CORRECTLY RESOLVED BELOW THROUGH THE APPLICATION OF ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW (ALTHOUGH APPLIED TO AN AGENCY NOT PREVIOUSLY INVOLVED IN LITIGATION RAISING THIS ISSUE), THE CASE AT BAR INVOLVES NO NOVEL LEGAL ISSUES DESERVING REVIEW BY THIS COURT	16
CONCLUSION	20

TABLE OF CITATIONS

Cases:

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	17

Page

Kauder v. United Board and Carton Corp., 199 F.Supp. 420 (S.D.N.Y. 1961) 14

Leighton v. Securities and Exchange Commission, C.A. 2, No. 26458, November 3, 1960, *cert. denied*, 365 U.S. 888 (1961) 18

McGrath v. Kristensen, 340 U.S. 162 (1950) 16, 18, 19, 20

Peck v. Greyhound Corp., 97 F.Supp. 679 (S.D.N.Y. 1951) 14

Peck v. Securities and Exchange Commission, C.A. 2, No. 22289, April 7, 1952 18

Perkins v. Elg, 307 U.S. 325 (1939) 16, 19, 20

Schilling v. Rogers, 363 U.S. 666 (1960) 17

Sherman v. Posner, 266 F.Supp. 871 (S.D.N.Y. 1966) 14

Statutes, Rules and Regulations:

Administrative Procedure Act, 60 Stat. 237 *et seq.*:
Section 5, 5 U.S.C. § 554(a), (e) (Supp. V, 1970) 8
Section 10(c), 5 U.S.C. § 704 (Supp. V, 1970) 15

Securities Exchange Act of 1934, 48 Stat. 881 *et seq.*:
Section 19(a)(2), 15 U.S.C. § 78s(a)(2) 8
Section 25(a), 15 U.S.C. § 78y(a) 8, 9, 10, 12

Rules of the Securities and Exchange Commission
Rule 14a-8(d), 17 C.F.R. § 240.14a-8(d) 5, 14
Rule 14a-6(a), 17 C.F.R. § 240.14a-6(a) 14
17 C.F.R. § 202.1(a), (b), (c) 4

Miscellaneous:

Aranow and Einhorn, *Proxy Contests for Corporate Control* (2d ed., 1968) 14, 18

Chairman of the Securities and Exchange Commission, Speech before the National Investor Relations Institute (Washington, D.C., November 6, 1970) 19

Clusserath, "The Amended Stockholder Proposal Rule; A Decade Later," 40 Notre Dame Lawyer 13 (1964) 18

	Page
3 Davis, *Administrative Law Treatise* (1965 Supp.)	18
III Loss, Securities Regulation (1961)	18
Note, "Corporations–Proxy Rules–Judicial Review Available For Securities and Exchange Commission's Refusal to Compel Corporation to Include Shareholder's Proposal in Proxy Statement," 45 N.Y.U.L. Rev. 1098 (Nov. 1970)	15
Saferstein, "Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'" 82 Harv. L.Rev. 367 (1968)	17
Sec. Ex. Act Rel. No. 4979, 19 Fed. Reg. 246 (1954)	5, 15
SEC Tenth Annual Report. A Ten-Year Survey (1944)	3
SEC Thirty-Fifth Annual Report (1969)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1162

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

It is the position of respondent, the Medical Committee for Human Rights, that the instant petition for certiorari should be denied. We believe that petitioner has misunderstood certain of the basic facts in the present case and as a result has misconceived the nature and the importance of the sole issue—one of judicial review of administrative action—for which review is sought.

QUESTION PRESENTED

Where a dispute has arisen between a corporation and a shareholder as to the proper legal interpretation of the SEC's Proxy Rules relating to the inclusion of shareholder proposals in corporate proxy materials, and where the mandatory rules of the SEC require the parties to such a dispute to bring the matter before the agency for its consideration, and where the five-man Commission has then voluntarily chosen to review the matter and has apparently endorsed the legal position taken by the company, rejecting the legal arguments of the shareholder, was it error to hold that the Commission's action was subject to judicial review by the United States Court of Appeals for the District of Columbia?

COUNTERSTATEMENT

A. THE TYPE OF COMPANY-SHAREHOLDER DISPUTE INVOLVED

The petition for certiorari is very clearly designed to create the impression that the Securities and Exchange Commission handles thousands of corporate "proxy" problems every year (the petition says 5,300 in 1969), that the Court of Appeals below has held that the agency's handling of every one of these thousands of proxy problems is now to be subject to judicial review, that the ruling below thus foreshadows a veritable avalanche of "unnecessary appellate litigation," and that this Court must now step in to stop the avalanche before it gets started.

This is a highly inaccurate portrayal of this case. It is a fact, as the petition emphasizes, that whenever a corporation has prepared a proxy statement to be mailed out to its shareholders in advance of the company's annual meeting, the SEC requires the company to submit its proxy materials to the agency in advance for the agency's review under certain "informal procedures" which have been adopted for that purpose. It is no doubt also true that in the year

1969 "more than 5,300 proxy statements" were reviewed by the agency under these informal procedures (see Pet. 15). But these propositions have nothing to do with this case. This case simply does not involve the SEC's ordinary, informal review of corporate proxy materials, and the decision below by its own terms precludes any notion that there should be judicial review of such administrative action.

The problem involved in this case can arise only on those relatively rare occasions when a shareholder submits a proposal to management with a request that management include his proposal in the corporate proxy materials which are to be distributed to all shareholders before a corporate meeting. Long ago the SEC recognized that, if individual shareholders were going to have an effective voice in the affairs of their companies, it was important that corporate managements honor such requests and include such shareholder-proffered proposals in management's proxy materials. Accordingly, in order to bring about "a revitalization of the democratic process in the conduct of corporate affairs,"[1] the SEC years ago promulgated a set of proxy rules which require corporate management to include *every* shareholder proposal in management's proxy materials unless the proposal falls within certain limited exceptions delineated in the Proxy Rules. As further explained below, this case arises because (a) a shareholder (the Medical Committee) submitted a proposal to a company (Dow Chemical Company) for inclusion in the company's proxy materials and (b) the company refused to include the proposal, rejecting the shareholder's legal arguments to the effect that as a matter of law inclusion was required.

Before considering the administrative action thereafter taken in this dispute, it is important to note the frequency with which such matters come before the SEC. According to the Commission's Thirty-Fifth Annual Report, 47 (1969) —the same report which indicates that the SEC reviewed

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[1] SEC Tenth Annual Report, *A Ten-Year Survey*, 31 (1944).

5,300 proxy statements in 1969—in that year a total of no more than 137 companies received proposals from their shareholders. In 118 of those cases the company agreed to include the proposals in its proxy materials, and in only 19 cases were the proposals omitted. Moreover, it appears that in many of those 19 cases the shareholder proposals were omitted from the proxy materials because the shareholder himself voluntarily withdrew them—leaving, from among those 19 cases, only a handful (probably less than ten in 1969) in which an actual deadlock arose between the shareholder and management. The SEC's method of handling these rare confrontations is described below.

B. THE MANDATORY PROCEDURES ESTABLISHED BY THE SEC FOR THE HANDLING OF SUCH DISPUTES

Although it is true, as petitioner has repeatedly emphasized, that the SEC has established what it describes as "informal procedures" for its regular review of corporate proxy materials (Pet. 8-9, 15), those "informal procedures" are *not* applicable to company-shareholder disputes of the kind here involved and were not followed in this dispute. On the contrary, because of the importance of the right of a shareholder to have his views included in management's proxy materials, the SEC has established what it itself describes as "formal" and mandatory procedures which are specially designed to deal with the rare situation in which a corporate management flatly refuses to accept a shareholder proposal for inclusion in its proxy materials. These self-described "formal procedures"[2] are as follows:

1. The Proxy Rules require that, whenever the management of a corporation decides to exclude a proffered shareholder proxy proposal, management *must* submit the proposal and supporting papers "as received from the security holder" to the SEC's Division of Corporation

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[2] 17 C.F.R. § 202.1(a), (b), (c).

Finance, together with the opposing views of management and an opinion of counsel setting forth the legal justification for management's position where that position is "based on matters of law." Rule 14a-8(d), 17 C.F.R. §240.14a-8(d). In the instant case, when the Medical Committee submitted its proposal to Dow, Dow complied with this requirement (R. 9a-13a, 18a-19a).

2. The SEC Proxy Rules require that the parties' position papers be filed with the Division of Corporation Finance not later than 20 days *prior* to the date on which preliminary copies of the proxy materials are filed with the agency for routine review, so that the agency "will have more time to consider the problems involved in such cases . . . ." Sec. Ex. Act Rel. No. 4979, 19 Fed. Reg. 246 (1954). Dow complied with this requirement. (R. 9a-13a, 18a-19a).

3. The Proxy Rules require management to notify the shareholder of its action and serve the shareholder with copies of the materials filed with the SEC. Dow complied with this requirement (*Id.*).[3]

4. When the matter is thus submitted to the agency under the foregoing mandatory rules, "the burden of proof" is "upon the management to show that [the shareholder's] proposal is not a proper one for inclusion in management's proxy materials." 19 Fed. Reg. 246 (1954).

In the instant case the sole issue between the Medical Committee and Dow was a purely legal issue as to the interpretation of the SEC's own Proxy Rules—namely, whether the proposal of the Medical Committee fell within or without one or more of the legal exceptions which, under the Rules, would justify management in excluding the proposal (R. 9a-13a, 18a-19a, 26a-32a, 38a-39a). Both the Medical Committee and Dow submitted legal argument to the SEC on that pure question of law. (*Id.*)

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[3]The petition implies that in this case the parties' papers were submitted to the SEC simply because the Medical Committee so requested (Pet. 3), whereas in fact Dow was required to submit the papers to the agency, whether the Medical Committee so requested or not.

It should be emphasized that when such disputes are brought before the agency, they are normally handled solely by the staff of the Commission (specifically, the Division of Corporation Finance), rather than by the five-man Commission itself. The Commission is under no legal obligation, either under its own rules or otherwise, to pass judgment on such disputes, and it normally does not do so. Ordinarily the Commission will consider the matter only if the particular case seems to be one of unusual importance.[4] As indicated immediately below, the instant case seems to have been so considered by the Commission. Had it not been, judicial review would not (as explained below) have been available.

C. THE ACTION TAKEN BY THE AGENCY IN THIS CASE

Included within the papers which Dow was required to (and did) file with the SEC's Division of Corporation Finance was an opinion of Dow's counsel to the effect that, under his reading of the SEC's Proxy Rules, it was lawful for Dow to exclude the Medical Committee's proposal from the company's proxy materials. On February 18, 1969, the Division of Corporation Finance explicitly endorsed the legal position taken by Dow's counsel, informing Dow by letter that the Division would not recommend any action against Dow "for reasons stated in your letter and the accompanying opinion of counsel" (R. 20a). Thereafter the five-man Commission, although it rarely does so, also decided to consider the matter. Its decision in this case was to accept and *approve* "the recommendation of the Division of Corporation Finance" (R. 44a-45a, 46a).[5] As pointed out in the

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[4] The petition apparently concedes the rarity of action by the Commission itself. Set Pet. 8.

[5] The petition says that "the Commission did *no more* than indicate it would not take enforcement action if Dow declined to include the proposal" (Pet. 11, emphasis added), but that statement is not precisely correct. The Commission explicitly indicated that it had "approved the recommendation of the Division of Corporation Fin-

unanimous opinion of the Court of Appeals below, it is apparent that the legal position taken by Dow's counsel and explicitly endorsed by the Division of Corporation Finance "was then adopted by the full Commission" (App. 39a). That the Commission was making a purely legal determination as to the interpretation of its Proxy Rules has never been denied by the Commission at any point in this litigation.[6]

D. THE RELIEF SOUGHT BY THE MEDICAL COMMITTEE IN THE COURT OF APPEALS BELOW

In order to understand what the Medical Committee asked of the Court of Appeals, it is necessary to understand the various alternative courses of action which are open to the Commission when (a) it decides to rule upon a shareholder-management dispute of this kind and (b) concludes that management has erroneously refused to accept the shareholder proposal for inclusion in the proxy materials. The petition for certiorari suggests that in such circumstances the Commission would have only two choices—either to take no action or "to institute an injunction action against the company in the District Court"; the petition repeatedly

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ance" (R. 44a), and the latter recommendation was explicitly based upon the legal conclusion asserted by Dow.

[6]The petition for certiorari asserts that "*the basic error* of the court of appeals" was its conclusion from the record that the Commission had endorsed Dow's position on the merits of the controversy (Pet. 11, emphasis added). As a preliminary comment we think that the charge that "the basic error" in the decision below was an error in *reading the record* militates, without more, against a grant of certiorari in this case. In addition, however, the petition's charge of "basic error" overlooks these facts: (1) The Division of Corporation Finance explicitly endorsed Dow's position on the merits and on that basis recommended no action against Dow; (2) the Commission explicitly adopted the recommendation of the Division; and (3) the Medical Committee has repeatedly challenged the Commission to deny that it endorsed Dow's position on the merits, and the Commission has refused so to deny.

maintains that there are no affirmative sanctions which the Commission itself could bring to bear against a company in such a situation without resort to the courts. (Pet. pp. 7, 10, 16). In fact, however, if the Commission concludes that a company has wrongfully refused to include a shareholder proposal in its proxy materials, there are at least four alternative courses open to the Commission: (1) the Commission can file a suit for injunctive relief against the company; or (2) the Commission can commence a new administrative proceeding looking toward suspension of the registration of the company's securities because of its violation of the Proxy Rules;[7] or (3) the Commission can commence a new administrative proceeding against the company looking toward an administrative declaratory order that the company has violated the Proxy Rules;[8] or (4) the Commission can decide, despite the company's violation of the Proxy Rules, that the Commission should nevertheless take no action against the company for some reason falling within the realm of prosecutorial discretion (*i.e.*, lack of funds or personnel, dissatisfaction with the particular facts as a basis for litigation, etc.).

In the instant case, when the Commission apparently adopted the legal interpretation advanced by Dow, the Medical Committee regarded that conclusion as being not only incorrect but also potentially damaging to the Medical Committee and to corporate shareholders generally for years to come. Accordingly, the Medical Committee filed a petition for review of the Commission's action in the United States Court of Appeals for the District of Columbia Circuit, relying upon Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a), which provides in effect that "any person aggrieved" by a Commission order "in a proceeding under this Chapter to which such person is a party" may obtain appellate review. But in its petition and subsequent briefs the Medical Committee made clear that it

[7] 15 U.S.C. § 78s(a)(2).

[8] 5 U.S.C. § 554(a), (e) (Supp. V, 1970).

was *not* asking the Court of Appeals, if it should agree with the Medical Committee's position on the merits, to direct the Commission to take any one or another of the various alternatives open to the Commission in such circumstances; the Medical Committee has consistently recognized, as has the Court of Appeals, that the particular choice among these alternatives was a matter to be left to the discretion of the Commission. Accordingly, the Medical Committee simply asked the Court of Appeals (a) to review the Commission's apparent interpretation of the Proxy Rules and (b), if the Court concluded that that legal interpretation was wrong, to remand the case to the Commission to allow it to exercise its discretion (as among the four available choices) consistent with a *proper* interpretation of the Proxy Rules.

E. THE PROCEEDINGS IN THE COURT BELOW

The petition for certiorari has failed to describe fully the first step taken in the court below. Immediately after the Medical Committee had filed its petition for review, the SEC moved to dismiss the petition, arguing that the action taken by the Commission below was not reviewable under Section 25(a) of the Exchange Act. After the motion had been fully briefed and argued before Tamm, Leventhal, and McGowan, JJ., Judge Tamm voted to dismiss the petition for want of jurisdiction (a point on which he later changed his mind), but Judges Leventhal and McGowan voted to deny the Commission's motion to dismiss "without prejudice to renewal thereof in the briefs and at the argument on the merits." It was so ordered on October 13, 1969.[9]

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[9] The per curiam order reads as follows:

> "This cause came on for consideration on respondent's motion to dismiss the petition for review herein, and the Court heard argument of counsel. On consideration thereof, it is
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> "ORDERED by the Court that respondent's aforesaid motion to dismiss is denied without prejudice to renewal thereof in the briefs and at the argument on the merits."

Thereafter the Medical Committee, the appellant below, filed a 50-page brief directed entirely to the merits—*i.e.*, to the question whether Dow and the Commission were correct in their reading of the Proxy Rules as applied to the Medical Committee's proposal. Although the Court of Appeals clearly contemplated that both parties would present "full argument on the merits" (see App. 32a), the Commission refused to do so; it filed a brief which was again directed solely to the question whether the Court of Appeals had jurisdiction to review the Commission's action.[10] At no time in this litigation—either in the instant petition for certiorari or at any prior stage—has the Government ever undertaken to defend the legal interpretation which Dow and the Commission placed upon the SEC's Proxy Rules in the present controversy.

The panel which considered the case in full below consisted of Tamm, McGowan, and Robinson, JJ. They unanimously held (1) that the legal determination apparently made by the Commission below was subject to judicial review under Section 25(a) of the Exchange Act and (2) that, on the merits, at least on the present record "the position taken by [Dow] and endorsed by the Commission" with respect to Dow's legal obligation to include the Medical Committee's proposal in its proxy materials appeared to be erroneous as a matter of law. (See App. 33a, *et seq.*) Since the petition for certiorari does not now seek review of the court's unanimous view of the merits, for the purposes of the present proceeding it must be *assumed* that Dow, with the endorsement of the Commission, *wrongfully* excluded the Medical Committee's proposal from the company's proxy materials.

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[10] See the following statement in the opinion below:

> "Despite the fact that our October 13 order in this case deferred resolution of the jurisdictional issue pending *full argument on the merits* . . ., the Commission has not deigned to address itself to any possible grounds for allowing management to exclude this proposal from its proxy statement." (App. 32a, emphasis added).

REASONS FOR DENIAL OF THE WRIT

I. SINCE THE PRINCIPLE OF REVIEWABILITY APPLIED BELOW WOULD PROVIDE JUDICIAL REVIEW OF SEC ACTION ONLY IN VERY RARE CIRCUMSTANCES, THE PETITION FOR CERTIORARI HAS SUBSTANTIALLY OVERSTATED THE PRACTICAL IMPLICATIONS OF THE RULING BELOW.

The instant petition for certiorari has resorted to the familiar device of "a parade of horrors." The basic argument is (a) that, *whenever* the SEC looks at proxy materials, for whatever purpose, it invariably proceeds "informally" and (b) that to allow judicial review of all agency decisions as to proxy materials would "necessarily" require the agency to formalize all of its informal proxy reviews—some 5,300 per year—which would unduly hamper the agency's operations and promote "unnecessary appellate litigation" on a grand scale (see Pet. pp. 14-17).

As pointed out in our Counterstatement of the case, this line of argument is highly misleading. This case has nothing to do with the 5,300 proxy reviews which the agency makes on a routine informal basis every year (see pp. 2-4, *supra*); it relates only to a handful of situations (probably less than ten per year) in which a company flatly refuses to accept a shareholder proposal for inclusion in the company's proxy materials, thus giving rise to "an adversary encounter" which, under the agency's mandatory rules, must be brought before the agency in accordance with the latter's specially designed "*formal* procedures" for handling such disputes.[11]

Moreover, it should not be thought that the decision below calls for judicial review every time the agency takes action in one of these "adversary encounters." The statu-

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[11] The court below made very clear that its ruling applies only where "an adversary encounter" between a shareholder and management has been brought before the agency pursuant to the "mandatory" and "formal procedures" followed in this case (App. 16a-23a) —which renders the ruling below wholly inapplicable to the agency's routine "informal" review of proxy statements.

tory review provision invoked in this case—Section 25a of the Exchange Act—allows judicial review only where action has been taken by the five-man *Commission*; both the Medical Committee and the Court of Appeals below have affirmatively disavowed any thought that judicial review is available where a shareholder-management dispute is handled at the staff level and the Commission itself has not stepped in. Furthermore, as the Court of Appeals emphasized, the Commission has complete and unfettered discretion as to whether to undertake a decision in the matter itself or whether to leave the issue to the staff (see App. 29a), which means that the Commission, if it wishes, can completely eliminate judicial review of agency action in disputes of this kind, simply by not taking action itself in the particular dispute. In any event, given the facts that only about ten such disputes reach the agency in a given year and that a minority of those are selected by the Commission for its own personal review, it would appear that the Commission itself probably acts in only three or four such cases per year.

Finally, although the ruling below would theoretically subject each of those three or four Commission decisions in a given year to judicial review, it is clearly predictable that judicial review would not be sought in each such case. For example, if the administrative record in a given case indicated that the Commission, having chosen to rule but not to prosecute, had rested the latter decision solely on matters falling within its prosecutorial discretion (e.g., a lack of sufficient funds or personnel), without having reached any legal conclusion which would be harmful to the shareholder, the shareholder would have no incentive to seek review of the Commission's decision.[12]

[12]Theoretically, an exercise of prosecutorial discretion by the Commission might be subject to extremely narrow judicial review to determine whether the administrative discretion had been abused, but it is highly unlikely that, in the absence of a legal determination by the Commission, any shareholder would expend the necessary time and money to obtain review and demonstrate a discretionary abuse, simply because such review would not provide any legal interpretation of the Proxy Rules.

The shareholder would have such an incentive only if it appeared that the Commission's action was based upon an erroneous legal interpretation which would plague the particular shareholder in any later private suit which he might bring[13] and which would also deprive other shareholders of affirmative help from the Commission in similar shareholder-management disputes in the future. Presumably this set of circumstances would arise in less than all of the three or four annual disputes in which the Commission itself (judging from past experience) might become involved.

The upshot is that the decision below, in a given year, might give rise to one or two direct appellate review proceedings which might not otherwise have occurred—but such a proceeding can and will occur only where the Commission itself has decided to inject itself into the dispute involved and has given some indication that its decision in the particular case is worth appealing. In view of the rarity of such situations, the decision below obviously would *not* lead, as the petition suggests, to the "formalization" of a vast number of decision-making steps on the part of the agency,[14]

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[13]The petition for certiorari argues at length that the Commission's interpretation of the Proxy Rules in a particular dispute would be "legally irrelevant", and could not properly be given weight, in any private suit later brought by the shareholder against the company (Pet. 12, n. 10). As the petition itself recognizes, however, the argument is inconsistent with a line of decided cases. See also p. 14, n. 15, *infra*.

[14]The petition argues that the decision below will require "more formal procedures" to be followed by the agency in reviewing the "5,300 proxy statements" which it handles every year (see Pet. 15-16). As indicated above, in fact the decision below will have no impact on the "informal procedures" used in reviewing proxy statements on a routine basis. Moreover, the SEC has already "formalized" its procedures for handling shareholder-management disputes with respect to shareholder proposals. The only effect that the decision below can have in terms of "formalizing" the conduct of the five-man Commission would be to require the Commission, when interpreting its own Proxy Rules in connection with such a dispute, to enunciate its interpretation with sufficient clarity to allow a reviewing court to determine whether the interpretation was correct as a matter of law.

and it has no possibility of creating an avalanche of "unnecessary appellate litigation."

In this last connection it should not be thought that *any* "unnecessary" appellate litigation will result from the ruling below. The petition's assertion to the contrary rests upon the assumptions (a) that, when the Commission has refused to act in support of a shareholder in such a dispute, the shareholder can readily obtain "whatever relief is necessary" through a private suit in a Federal District Court (Pet. 17) and (b) that the Commission's earlier negative reaction to the shareholder's contentions would not be held against him in such a proceeding (Pet. 12, n. 10), thus rendering the private suit an effective remedy and direct appellate review of the Commission's action "unnecessary" (Pet. 16). As explained in the margin, however, both propositions are quite clearly incorrect.[15] Not only is the existence of the

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[15]Taking the cited propositions in reverse order,

(1) The District Courts traditionally give weight to the Commission's prior reaction to the issue, which cannot help but impair the shareholder's chances of success at the District Court level. The petition itself cites four examples (although suggesting that the four cited cases "were incorrectly decided", Pet. 12, n. 10), and numerous other examples exist: See, *e.g.*, Peck v. Greyhound Corp., 97 F.Supp. 679, 681 (S.D.N.Y. 1951); Kauder v. United Board and Carton Corp., 199 F.Supp. 420, 423-4 (S.D.N.Y. 1961); and Sherman v. Posner, 266 F. Supp. 871, 874 (S.D.N.Y. 1966). See also Aranow and Einhorn, *Proxy Contests for Corporate Control*, 296 (2d ed. 1968).

(2) The relief which is really "necessary" in such a case is an injunction prohibiting the company from distributing its proxy materials without including the shareholder proposal, but the time schedule established by the Commission (see 17 C.F.R. §§ 240.14a-8(d), 240.14a-6(a) may afford the shareholder only a few days in which to prosecute his case before the mailing date of the proxy materials, which forecloses the possibility of final injunctive relief, and in seeking preliminary injunctive relief the shareholder faces the double burden of attempting to show a likelihood of success on the merits in the face of a Commission rejection of his arguments.

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very dubious District Court remedy irrelevant to the present issue of reviewability,[16] but, as emphasized in the opinion below, such District Court litigation in a case of this kind would constitute an expensive and "circuitous" method of obtaining an authoritative appellate resolution of the legal question at issue (App. 23a-25a).[17] The fact that a shareholder could embark upon such a circuitous exercise certainly does not render "unnecessary" the type of judicial review—however rarely it will occur—that was undertaken below.

Indeed, the petition for certiorari itself acknowledges, perhaps inadvertently, the utility of such occasional direct review; it recognizes the possibility that such review may serve to "expose alleged legal errors of the Commission in interpreting and applying the proxy rules" (Pet. 17). We agree. And we also submit that, since erroneous interpretations of the Rules by the agency charged with their enforcement can have a drastic impact upon the rights of

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See also the following comment in the New York University Law Review (which commends the Court of Appeals' decision below):

> "While the intent of the SEC in these proxy matters is to place the burden of proof on the corporation's management [citing 19 Fed. Reg. 246 (1954)], it would hardly seem consistent that, in a private action to uphold the same rights the SEC is designed to protect, the burden should shift to the shareholder." 45 N.Y.U. L.Rev. 1098, 1102 (Nov. 1970).

[16]It is clear as a matter of law that the existence of a District Court remedy does *not* bar direct appellate review where such review is provided by statute. For example, Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides in effect that where, as here, agency action is "made reviewable by statute", the right to direct appellate review is not destroyed by the existence of some other "adequate remedy".

[17]The opinion below emphasizes that in the present case the facts are undisputed, that there is therefore no need to bring to bear any peculiar "competence of the district court", and that in such circumstances litigation at the District Court level is no more than a wasteful inconvenience. *Id.*

shareholders generally, such "exposure" through occasional and limited judicial review is vital to the preservation of corporate democracy in this country.

II. SINCE THE ISSUE OF REVIEWABILITY PRESENTED HERE IS ONE WHICH CAN BE AND WAS CORRECTLY RESOLVED BELOW THROUGH THE APPLICATION OF ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW (ALTHOUGH APPLIED TO AN AGENCY NOT PREVIOUSLY INVOLVED IN LITIGATION RAISING THIS ISSUE), THE CASE AT BAR INVOLVES NO NOVEL LEGAL ISSUES DESERVING REVIEW BY THIS COURT.

Although the Court of Appeals below obviously recognized that the principles of reviewability which it was invoking had never before been applied to a decision of this particular agency (the SEC) (presumably because no shareholder had previously been willing to assume the financial burden involved in seeking such review), the court also pointed out that its decision to undertake limited and partial review of a legal determination made by such an administrative agency was "scarcely a doctrinal innovation" and that review of this general kind had "been repeatedly sustained by the Supreme Court," citing, *inter alia, McGrath v. Kristensen,* 340 U.S. 162, 169 (1950), and *Perkins v. Elg,* 307 U.S. 325, 349-50 (1939) (App. 30a). In *Perkins v. Elg,* for example, the plaintiff sought judicial review of the Secretary of State's denial of a passport—a matter which, by tradition, was committed entirely to the discretion of the Secretary. The Government vigorously argued there, as it does here, that judicial review was not appropriate with respect to such a discretionary function, but the Court pointed out that the Secretary's decision in the particular case had been based entirely upon an interpretation of the law as to the plaintiff's legal eligibility for a passport. Presumably, if the Secretary had denied the passport on some discretionary ground, *de novo* judicial review would have

been inappropriate, but the Court squarely held that the Secretary's purely *legal* determination would and should be so reviewed. 307 U.S. at 349-50. As Mr. Justice Jackson later observed in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, n. 5 (1951),

> "The Secretary might say that [the applicant] would get no passport, but he could not, for unjustifiable reasons, say she was ineligible for one."

We think it apparent that the four judges[18] who considered the matter below were quite correct in their unanimous conclusion that these conventional and established principles of law were controlling on the issue of reviewability presented here.[19]

The petition for certiorari, however, repeatedly suggests (Pet. 6, 7, 8) that over the past 30 years it has been recognized, both by the courts and by commentators, that, if the Commission undertakes to consider a shareholder-management dispute as to the content of the company's proxy

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[18]As noted above, Judges Leventhal and McGowan voted to deny the Commission's motion to dismiss the Medical Committee's petition for review, with Judge Tamm dissenting, but Judge Tamm subsequently changed his mind and wrote the opinion below, with Judges McGowan and Robinson concurring, holding that judicial review was appropriate in this case.

[19]We simply do not understand the petition's attempt to "distinguish" the cited cases on the ground that the reviewable "legal rulings" involved in those cases were "preliminary to", rather than "an integral part" of, the discretionary function. (See Pet. 14). The attempted distinction would seem to turn merely on the order in which the agency considered the various elements which entered into its decision. Obviously the matter is not one of temporal order; the question is whether the legal issues decided by the agency are as a practical matter intelligibly separable from the discretionary factors so as to be capable of separate review. See Schilling v. Rogers, 363 U.S. 666, 675 (1960); Saferstein, "Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'" 82 Harv. L. Rev. 367, 381 (1968).

materials, and if the Commission then decides to act or not to act *on the basis of an erroneous interpretation of the law,* that erroneous legal decision by the Commission is immune from judicial review. The fact is otherwise. Neither of the two cases cited in the petition dealt with that issue.[20] As for the commentators cited in the petition (p. 6), neither Professor Loss nor Professor Davis asserts that a legal decision of the Commission made in a dispute involving a shareholder proposal is unreviewable. Indeed, Professor Davis, writing in his 1965 Supplement, has expressly recognized that *McGrath v. Kristensen, supra,* continues to be "good law, because it is in accord with other cases and because it allows the court to decide issues of law." 3 Davis, § 27.01, p. 148 (1965 Supp.).[21] Thus

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[20] In Peck v. Securities and Exchange Commission, C.A. 2, No. 22289, April 7, 1952 (discussed in the petition at page 6), the Commission itself filed a brief emphasizing to the Court of Appeals for the Second Circuit that the petitioner there was *not* "seeking review of the merits of the Commission's interpretation [of its Proxy Rules]" (Brief of Respondent in Support of Motion to Dismiss Petition for Review, p. 18, March 31, 1952). This necessarily means that *Peck* did not involve the issue presented here—a conclusion with which Professor Loss agrees. III Loss, Securities Regulation, 1926, n. 28 (1961).

In Leighton v. Securities and Exchange Commission, C.A. 2, No. 26458, November 3, 1960, *cert. denied,* 365 U.S. 888 (1961)—which did *not* involve a shareholder proposal for inclusion in the corporate proxy materials—the petitioner sought judicial review of a *staff* letter which said, "we will give the matter our careful consideration and will take any action which seems appropriate under the circumstances." Obviously judicial review of the staff letter was denied, but that says nothing about judicial review of a *Commission* decision of law in a shareholder-management dispute.

[21] The petition also relies (p. 6) upon Aranow and Einhorn, Proxy Contests for Corporate Control, 297 (2d ed. 1968), and Clusserath, The Amended Stockholder Proposal Rule; A Decade Later, 40 Notre Dame Lawyer, 13, 17 (1964). Although these two sources refer to a decision of the kind here at issue, they hardly evidence a "generally recognized" view—particularly since these are sources which concentrate upon the internal practices of the SEC rather than the problems and principles of judicial review.

the petition's citations do *not* establish that the unanimous decision below represents a departure from established general principles of administrative law, and the judges who made it did not so regard it.

In attempting to defend the proposition that the legal principles invoked below are wholly unconventional, the petition for certiorari attempts to belittle the utility of judicial review in such circumstances. As noted above, the petition insists that in such a case "the Court of Appeals can do *no more* than expose alleged legal errors of the Commission in interpreting and applying the proxy rules" —as though such "exposure" were hardly a worthy objective—and that such a judicial decision "determines nothing at all with finality and is but the harbinger of further proceedings to come" (Pet. 17, emphasis added). But precisely the same can be said of this Court's decisions in *Perkins v. Elg* and *McGrath v. Kristensen, supra.* The purpose of judicial review in such circumstances is precisely to "expose" any "legal errors" made by a responsible administrative agency in performing its discretionary functions and to remand the controversy to the agency to allow it to exercise its discretion in a manner consistent with the *correct* principles of law enunciated by the Court. So here, the review undertaken by the court below has already succeeded in exposing an apparent legal error which has been affecting the conduct of the Commission, with a resulting (and wrongful) contraction of the Commission's view of its own responsibilities, and the utility of the exposure is already apparent.[22] As the cited decisions of this Court

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[22]On November 6, 1970, the Chairman of the Commission delivered a speech before the National Investor Relations Institute in Washington, D.C., and stated publicly that the Court of Appeals' views on the merits in this case have already resulted in a fresh administrative review of the substantive content of the Proxy Rules. Referring to the decision of the Court of Appeals below, the Chairman stated in part as follows:

> "For this and other reasons, our staff is reconsidering our substantive rules relating to shareholder proposals to determine if appropriate amendments are needed."

demonstrate, it has long been recognized that occasional corrective judicial review serves to insure that an administrative agency will carry out its discretionary responsibilities on the basis of a correct understanding of the law, and experience confirms (judging from the aftermaths of *Perkins v. Elg* and *McGrath v. Kristensen, supra*) that such corrective judicial action does *not* lead to a flood of "unnecessary" appellate proceedings.

CONCLUSION

Since the carefully confined principle of judicial review enunciated below can have practical application only in those rare situations where the Securities and Exchange Commission has voluntarily undertaken to make a legal determination in a shareholder-management dispute over a shareholder proposal for inclusion in the proxy materials, and since the decision below was correctly based upon conventional principles of administrative law long ago established by this Court, that decision does not merit review by this Court, and the petition for certiorari should be denied.

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